

## Beyond Private Ordering: Families and the Supportive State

by  
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Most Americans agree that the family is a critical institution of American life. There is little agreement, however, with respect to the role that the state should play when it comes to important family ties. In this article, I want to expand the focus of the discussion on private ordering in this issue of the *Journal of the American Academy of Matrimonial Lawyers*. My plan is to discuss the subject of the state's relationship to private ordering in families not narrowly—in terms of the extent to which courts should enforce private agreements among family members—but more broadly in terms of the extent to which we should expect families to function completely on their own, as against the state's adoption of public policies that actively support families and the important caretaking and human development functions that they serve.

I am saying nothing new when I point out that a longstanding account of the state's proper role in American law, which is often associated with this country's grounding in liberal political thought,<sup>1</sup> focuses on the importance of adult individuals being free to choose their own life plan. This story has it that the state should be neutral on whether citizens enter families, and, when they do, on how these families function. The state, in this view, can still enforce the private agreements of the individuals who

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<sup>1</sup> I use the terms *liberal theory*, *liberal*, and *liberalism* throughout this article to refer to the American line of political thought stretching from John Locke through John Stuart Mill and on to such recent thinkers as John Rawls that focuses on the importance of liberty, self-government, and the equal worth of citizens. This use of the term is, therefore, broader than the use of the term *liberal* in common parlance to refer to those who hold political beliefs at the opposite end of the political spectrum from conservatives. Under my use of the term, both Speaker of the House of Representatives Nancy Pelosi, who qualifies as a liberal under common usage, and Supreme Court Justice Antonin Scalia, who is generally considered a political conservative, are liberals.

enter into families, since this enforcement enhances the liberty of these individuals, who can then order relationships as they choose. For the state to go beyond this posture of neutrality in order to support families, however, unfairly favors some ways of life over others, and distorts individuals' preferences. In some versions of the story, state support also skews the proper and "natural" ways that families should function, since families are seen to function properly only when they act removed from state influence.<sup>2</sup>

In this article, I argue that this longstanding account is fundamentally wrong about the proper role of the state when it comes to families. First and foremost, it fails to consider adequately the dependency that is a fundamental part of the human condition. This dependency creates needs for both caretaking and human development that must be satisfied in any flourishing society. And properly satisfying these needs requires, as I shall show, more than a hands-off attitude on the part of the state toward families, the institution in which these needs are largely satisfied.

What is more, in our society, there is no posture that the state can take that is completely neutral when it comes to families. In truth, the ways in which families function are always deeply and inextricably intertwined with government policy.<sup>3</sup> To mention just a few examples, child-labor laws keep children financially dependent on their parents; equal employment legislation has encouraged women's movement into the labor market and out of the home; and Social Security survivors' benefits influence some recipients not to marry. Most importantly, for the purposes of this article, law and public policy affect families' abilities to deal with dependency needs.

Because of this, and the critical role that sound families play in the lives of thriving citizens and a flourishing society, a government committed to human dignity must do more when it comes to families than simply seek to adopt a position of neutrality. It must, instead, actively seek to construct a network of policies that support families and the caretaking and human development

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<sup>2</sup> See generally MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2005).

<sup>3</sup> Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L. REFORM 835, 836 (1985).

functions that they fulfill. Such policies need not and should not usurp the responsibility of family members themselves for the welfare of children and to meet other dependency needs of their members. Instead, in the model of the family-state relationship that I propose, which I have elsewhere called “the supportive state,”<sup>4</sup> families appropriately bear responsibility for the day-to-day caring for (or arranging the care for) children and for meeting other dependency needs. Meanwhile, the state bears the responsibility for structuring societal institutions in ways that help families meet their caretaking needs and promote adequate human development. In this way, the supportive state seeks to balance the important goods of caretaking and human development with other important goods that its policies can implicate, including individual autonomy and sex equality.

This article proceeds in three parts. In the first, I consider the argument, currently dominant in public policy, that the state has no business in assisting parents’ care for their children. This argument, I demonstrate, misconceives the nature of the family-state relationship in contemporary society by ignoring the prominence of dependency in the human condition, as well as the impact that state policies have in meeting dependency needs. In the second, I turn to arguments that the state should disestablish civil marriage and other formalized forms of relationships between adults, and leave such relationships to be ordered by private contracts entered into between the parties. These arguments too, I show, fail to ensure that dependency needs will be properly met. Finally, in the third section I turn to consider the issue of what, if any, role remains for the doctrine of family privacy once we discard the notion that families should be left to their own devices and instead adopt a supportive state approach to families.

## **I. The Supportive State, Parents, and Childrearing**

What responsibility, if any, should the state have for meeting the dependency needs of young children? The view that currently dominates our public policy ascribes to parents virtually complete responsibility for childrearing. According to this view,

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<sup>4</sup> See MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* (2010).

the state's responsibility for children is "residual," in the sense that the state has a responsibility to act only when and if parents fail to meet their caretaking obligations.<sup>5</sup> In this section, I take a close look at the assumptions underlying the residual view and argue that they are fundamentally misconceived. A model in which the state is jointly responsible for children's welfare is a better fit with contemporary realities and is far more likely to ensure that children's needs for caretaking and human development are met.

#### A. *The Autonomous Family and Residual State Responsibility*

University of Chicago Law School professor Mary Anne Case lays out one of the most persuasive versions of a residual argument for state support of children. Case caused a stir at a feminist legal theory conference when she resisted the call, often made by feminist scholars and activists, that the state should support or require support for parents with caretaking responsibilities.<sup>6</sup> She argued that feminists who call for the state to ease mothers' caretaking burdens through subsidizing caretaking and mandating workplace protections for working parents were putting the burden on the wrong people. She contended that it is the children's fathers, rather than employers, other employees, or the state, who should step in to ease the burden on mothers since these fathers, like their partners, had chosen to bear and rear the children. To do otherwise, she asserted, would be unfair to those who have decided not to have children so that they would not have to assume these responsibilities. Indeed, Case asserted, policies that support parents in caretaking without simi-

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<sup>5</sup> The term "residual responsibility" was coined by Duncan Lindsey. DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* (1994).

<sup>6</sup> Case's comments were later published as *How High the Apple Pie? A Few Troubling Questions About Where, Why and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001). The original conversation occurred, however, at Martha Fineman's November 1999 "Uncomfortable Conversation on Children: Public Good or Individual Responsibility," symposium at Cornell Law School. As Case later described her position, "I was dragged reluctantly into that Conversation, . . . by people who had heard me express some of these thoughts in conversation; but even some of those people acknowledged that my role would be that of 'the turd in the punchbowl.'" *Id.* at 1786 n.5 (citing remarks of Kathryn Abrams during panel discussion).

larly supporting other activities that employees sought to engage in amount to “special rights” for parents.<sup>7</sup>

According to Case, the state’s responsibility for children should properly be triggered “only after those with an individual responsibility, notably fathers, are forced to kick in their fair share, financially and otherwise.”<sup>8</sup> Case likened the situation to one in which polluters who create environmental hazards are primarily liable for cleaning them up, while the state assumes secondary liability, which obligates it to act only if the cleanup is not adequately accomplished by the polluters. While Case opposed support for parenting, she stated that she would “be inclined to look more favorably on the state spending money in monitorable and controlled ways on the child and socially useful things for the child. This spending would not be formulated as payback to the parents but as direct benefit to the children.”<sup>9</sup>

Residual views of the state’s responsibility for dependency like Case’s dominate public policy in the United States. Their basic premise – that parents are properly the ones who are responsible for children, and that the state should step in only as a last resort if and when parents have exhausted themselves and their resources – accords with the notion from classical liberal theory that, to the extent possible, citizens can and should plan and bear responsibility for their own actions and their own lives. In this view, citizens who have children should be responsible for their decision to do so, and should be expected to plan carefully and budget wisely for them, as well as to care for them. Yet accepting this view does not exempt the state from responsibility for children. In fact, even those who oppose state support for families generally do not argue that the state bears no responsibility for children and other dependent citizens. Instead, as Case’s argument shows, they generally maintain that the state has a responsibility, but that responsibility is triggered only after parents fail in their responsibilities.<sup>10</sup> In contrast, proponents of state support argue that the state’s responsibility exists concurrently with parents’ own responsibility for children.

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<sup>7</sup> *Id.* at 1769.

<sup>8</sup> *Id.* at 1785.

<sup>9</sup> *Id.* at 1784.

<sup>10</sup> *See id.*

Robert Goodin, in his schematization of the division of moral responsibility for vulnerable persons, helps clarify the difference between these two visions of the state's responsibility.<sup>11</sup> Residual responsibility, the type supported by Case and others who oppose most state support for caretaking, involves a type of apportionment that Goodin calls "disjunctive." The defining feature of disjunctive responsibility is that, if *A* is vulnerable to *B* or to *C* or to *D*, then "any one of them could provide the needed assistance; and if any one of them does, none of the others need to."<sup>12</sup> The paradigm case of this type of responsibility is that of the drowning child at the crowded (but unguarded) beach: Any one of the bystanders could effect a rescue, and if any one does, the others need not. In the case of disjunctive responsibility, a particular person (for example, the nearest adult) may have a moral obligation to aid the vulnerable person before others attempt a rescue; this primary responsibility does not let all others off the hook, however. Once it becomes clear that the person with primary responsibility is not going to act, responsibility devolves on others. This, in essence, is the theory proposed by Case: Parents are supposed to have primary responsibility for children's welfare; this duty devolves to the state only if parents fail in their responsibility.

But as Goodin counsels, responsibility can also be divided in a "conjunctive" way, so that several persons—or, in this case, family members and the state—have a responsibility to ensure caretaking for societal dependents jointly.<sup>13</sup> The paradigm case for a conjunctive division of responsibility is a person trapped in a burning house. Not only does the firefighter who helps her out of the window have an obligation to do so, so do the firefighters who hold the trampoline below, and so does the emergency medical technician who provides emergency medical aid. To spin this out still further, the firefighter also requires training from others to be able to do her job well, as well as sufficient equipment. Therefore the fact that one actor bears responsibility to act does not preclude concurrent responsibility on the part of others.

So which type of responsibility, disjunctive or conjunctive, should we associate with the state's duty to meet citizens' depen-

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<sup>11</sup> ROBERT E. GOODIN, *PROTECTING THE VULNERABLE* (1985).

<sup>12</sup> *Id.* at 134.

<sup>13</sup> *Id.* at 136.

dency needs vis-à-vis families? The intricate interconnections between families and the state make it conceptually inaccurate to conceive of a family acting *before* the state steps in. In today's administrative society, the ways in which families function are always deeply and inextricably intertwined with government policy.<sup>14</sup> The state is not only involved in determining what constitutes a family and when family relationships are dissolved, it is also involved directly and indirectly in a multitude of other ways. For example, it reinforces parents' authority over children by subjecting the children to court supervision should they disobey their parents; by preventing other adults from caring for them; by allowing parents to have considerable power over whether children are institutionalized for mental-health reasons; and by child-labor laws that limit children's ability to live independently. As Frances Olsen points out, these policies generally go unrecognized as intervention by family privacy advocates only because they are so accepted that they are taken as inevitable.<sup>15</sup>

State regulation and public policy affects family life in many other ways as well. Some of these ways are more obvious: For example, the relaxation of divorce laws affects whether and which families stay together. Others are less obvious: For example, the state's regulation of other institutions outside the family deeply and profoundly affects the lives of families. The provision and mandating of education shaped and continue to shape the lives of children and affect parents' control over them. Equal employment legislation for women encouraged women to move out of the household and into the labor market.<sup>16</sup> Equal-employment laws likely also contributed to the increase in divorces, as women in unhappy marriages began to have more financial wherewithal to divorce their husbands.<sup>17</sup> Laws governing the availability of health insurance for employees' family members influence which family members work.<sup>18</sup> And United States'

<sup>14</sup> Olsen, *supra* note 3, at 836.

<sup>15</sup> *Id.*

<sup>16</sup> See William J. Carrington, Kristin McCue, & Brooks Pierce, *Using Establishment Size to Measure the Impact of Title VII and Affirmative Action*, 35 J. HUM. RESOURCES 503 (2000).

<sup>17</sup> See Paula Mergenhausen DeWitt, *Breaking Up Is Hard to Do*, 14 AM. DEMOGRAPHICS 53 (1992).

<sup>18</sup> SUNHWA LEE, INST. FOR WOMEN'S POL'Y RES., KEEPING MOMS ON THE JOB: THE IMPACTS OF HEALTH INSURANCE AND CHILD CARE ON JOB RE-

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welfare policy was, as Alice Kessler-Harris has demonstrated, constructed deliberately on a model that pitted work and family in mortal conflict, having considerable implications for the ways in which families function.<sup>19</sup>

By the same token, the care that children receive from parents is inextricably intertwined with state policies. Parental care takes place in a matrix of constraints and entitlements that affect a parent's ability and opportunity to parent. The existence or nonexistence of minimum wage laws, union rights to bargain, and overtime provisions affect parents' ability to meet the financial needs of their children.<sup>20</sup> Welfare-reform laws requiring recipients to work in order to receive welfare subsidies affect parents' ability to care for their children.<sup>21</sup> The scope of family-leave laws affects parents' opportunities to stay home with their children.<sup>22</sup> The stability and security of a parent's job affects stress levels in

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TENTION AND MOBILITY AMONG LOW-INCOME MOTHERS 34 (2007), available at <http://www.iwpr.org/pdf/C360KeepingMoms.pdf> (last visited June 20, 2009) (concluding that access to employer-provided health insurance significantly reduces the rate of leaving jobs: Low-income mothers with employer-provided health insurance in their own name are nearly three times more likely to stay on the job compared to mothers with other types of health insurance, all other characteristics being equal); see also Jonathan Gruber & Brigitte Madrian, *Health Insurance, Labor Supply, and Job Mobility: A Critical Review of the Literature* (Nat'l Bureau of Econ. Res., Working Paper No. W8817, 2002), available at <http://www.nber.org/papers/w8817.pdf> (last visited June 20, 2009); Brigitte Madrian, *The U.S. Health Care System and Labor Markets* 13 (Nat'l Bureau of Econ. Res., Working Paper 11980, 2006), available at <http://www.nber.org/papers/w11980> (last visited June 20, 2009).

<sup>19</sup> ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN TWENTIETH-CENTURY AMERICA (2001).

<sup>20</sup> See, e.g., Ronald B. Mincy, *Raising the Minimum Wage: Effects on Family Poverty*, 113 MONTHLY LAB. REV. 18 (1990) (discussing the higher than expected impact of raising the minimum wage on family poverty, and thus a family's ability to meet their children's needs).

<sup>21</sup> LISA A. GENNETIAN ET AL., MDRC, MAKING CHILD CARE CHOICES: HOW WELFARE AND WORK POLICIES INFLUENCE PARENTS' DECISIONS (2002), available at <http://www.mdrc.org/publications/182/policybrief.html> (last visited Mar. 8, 2010) (finding that work requirements that are tied to child care subsidies affect the stability of care arrangements whenever there are changes in employment status or income).

<sup>22</sup> INST. FOR WOMEN'S POL'Y RES., FACT SHEET: MATERNITY LEAVE IN THE UNITED STATES 2 (2007), available at [http://www.iwpr.org/pdf/parental\\_leaveA131.pdf](http://www.iwpr.org/pdf/parental_leaveA131.pdf) (last visited Mar. 8, 2010) (stating that "[w]omen workers who



the household, which also affect the quality of parenting. State support for and subsidizing of drug-treatment programs makes it easier or harder for parents to deal with drug addictions that can impair their ability to care for their children.

In these circumstances, the family has no “natural” baseline of functioning that it can be left to “apart from” the state and public policy. Instead, the state is always and continually influencing how families conduct their affairs. Thus, the issue is not whether state policy will influence families, but whether it will be formulated with this inevitable influence in mind. When it comes to the ways families function, no family is an island.

Furthermore, families and the state are not similarly situated when it comes to dealing with dependency needs. Families are better suited to performing the hands-on care and arranging other care for those with such needs, yet are less well suited to arranging institutions to support care. In contrast, the state is uniquely suited to ensuring that dependency needs are accommodated at an institutional level by establishing relevant laws and regulations. In this situation, it makes far more sense to conceive of the state’s and families’ responsibilities as conjunctive.

Returning to the example of the child drowning near multiple adult bystanders makes it clear why the model of disjunctive responsibility is a poor fit to the situation of responsibility for dependents. First, the actors at issue—families and the state—do not act independently of one another, as they do in the drowning example. Instead, institutions structured directly and indirectly by the state profoundly affect families’ ability to care for their members. The child’s best chance for achieving well-being is, therefore, not for the nearest adult to rescue the child single-handedly while the state acts just as another bystander. Instead, the child is best served by families and the state acting in conjunction with each other. Put another way, the state’s position could be likened to a pilot in a nearby helicopter, who could drop a life preserver near the struggling child that would assist the adult in towing the child back to shore. Seen in this light, the positions of the relevant actors are considerably closer to the situation of conjunctive responsibility that Goodin describes, in

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have some form of paid leave take on average 10.5 weeks off after childbirth, while women without any paid leave take 6.6 weeks”).

which the actors should work together to protect the vulnerable person.

The drowning child example, however, omits some of the strongest reasons in favor of conjunctive state responsibility for children and other dependents. Raising children, caring for dependents, and developing human capabilities are all activities that cannot be wrapped up in seconds or minutes like an ocean rescue. Instead, they are complex tasks that are part of a process that generally takes years. As feminists including Martha Fineman and Eva Kittay have pointed out, dependency is both an inevitable and significant feature of all human lives.<sup>23</sup> Humans are born completely dependent and live in near-total dependence on others for roughly the first decade of their lives. They spend their next decade requiring considerable assistance from others, although generally to a decreasing extent. During these first two decades, and often longer, they require a number of things to become healthy, flourishing adults and contributing members of the polity. For one thing, they require significant caretaking, which, for young children, involves a wide array of tasks. They must be supervised to ensure they are safe, played with, interacted with, fed, bathed, changed, put to bed, picked up when they are crying, and taken to the doctor when they are sick, among a hundred other activities. In addition to caretaking, children require certain things to foster the human development it takes for them to become sound adults and good citizens. During the course of youth, they must learn to perform for themselves many of the tasks that adults have performed for them. They must also develop deep and stable attachments with at least a few others, receive moral guidance, learn social skills, acquire an education and skills to support themselves when they reach adulthood, and develop citizenship skills. Meeting human development needs, like meeting caretaking needs, requires a considerable investment of time, attention, and resources.

No family can reasonably accomplish all these tasks for this long period of time absent favorable conditions. During this time, families will necessarily interact with a number of institutions, most prominently the labor market, that profoundly influ-

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<sup>23</sup> See FINEMAN, *supra* note 2; see also EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* (1999).

ence caretakers' ability to meet family members' dependency needs. By the same token, dependents will interact with a number of institutions aside from the family that profoundly influence their development, including schools, day-care centers, the labor market, and the health-care system. Given the limits of families in controlling and navigating these other institutions, as well as the unique ability that the state has to exercise influence over these other institutions, a state committed to the human dignity of its citizens will assume responsibility for meeting dependency needs along with parents and other family members.

### *B. Conjunctive Responsibility and the Supportive State*

Determining that the state and families are both conjunctively responsible for meeting dependency needs does not mean that the state's role should be identical to the role of families. Rather, each should bear responsibility for the area in which they have greater competence. This means that families should bear responsibility for the day-to-day caring for (or arranging the care for) children and others with dependency needs. Meanwhile, the state should accept the responsibility for structuring institutions in ways that help families meet their caretaking needs, and that support human development. This includes ensuring that families have safe and affordable caretaking options, as well as structuring other societal institutions, such as schools and communities, in ways that foster children's and other dependents' development and well-being. This division of responsibility recognizes the malleability and contingency of institutional structures. It does not artificially separate state action from the realm of families or presume that completely clear boundaries can even be drawn between them, but it does assume certain spheres of authority will exist between the two. I call this vision of the state's role "the supportive state."

In dividing responsibility in this way, the supportive-state model respects citizens' autonomy by treating them as responsible citizens who are accountable for their choices and relationships with others. The liberal state, in this view, provides a scaffold on which citizens can construct their lives, but it does not plan their lives for them, or absolve them of the responsibility to plan carefully and budget wisely to achieve their goals. It maintains that the meeting of dependency needs that these family

members perform should be accomplished within institutional structures that facilitate caretaking and human development, and that it is the state's responsibility to secure such institutional structures. This approach recognizes the fact of dependency, and that the ability of families to nurture their members does not simply exist as a matter of fact, or spring up as a matter of spontaneous generation; instead, it is an achievement to be pursued jointly by both citizens and the state.

Yet what about Case's argument that state support for children unfairly burdens those who, through chance or through choice, did not have children, insofar as it distributes some of the childrearing burden to them? This argument against support for caretaking is premised on a straitened view of the purposes of government. It presumes that the only fair principle for state action is a narrowly conceptualized version of equal treatment, in which the state treats all persons the same, whether they are raising children or performing other activities of choice.<sup>24</sup> Yet although the principle of equal treatment has much to recommend it in a broad variety of situations, it should not and cannot be the only principle that determines the distribution rights and privileges in a vigorous society. Insofar as satisfying dependency needs is not something that families can do alone, state support for dependency needs is essential to maintaining human dignity, a goal which should be basic to the government's purposes. To the extent that the state cannot meet this goal simply by treating

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<sup>24</sup> Case, *supra* note 6, at 1767 ("The difficulty I have experienced goes beyond privileging certain kinds of family over others, and more broadly extends to a privileging of family matters over an employee's other life concerns"); *id.* at 1768-69 ("If there must be legislation on parental status discrimination, I agree with Elinor Burkett about its scope. [According to] Burkett, 'Last time I checked, discrimination law generally cut both ways. We don't bar discrimination against women; we bar discrimination on the basis of gender, and so on. So why single out parents? Why not bar discrimination on the basis of family status? Why not make it illegal to presuppose that a nonparent is free to work the night shift or presuppose that nonparents are more able to work on Christmas than parents?'); *id.*, at 1769 ("I note that much that is complained of is not as a technical matter discrimination against parents, but rather a failure to discriminate in their favor. Consider the oft-cited case of the mother fired for her inability to do required overtime because of childcare responsibilities. There is no evidence that a worker with a different reason for being unavailable would have kept her job. What is being sought on behalf of such parents really is something more like 'special rights,'” *id.* at 1769.).

all individuals and their preferred activities the same, privileging support for families' caretaking activities over other activities is legitimate.

In addition, although Case distinguishes between the state's providing benefits directly to children, which she would support to further children's welfare, and the state's providing benefits to the parents of children, which she would oppose on grounds of fairness to those who do not have children, the effect of these two policies on children's welfare cannot be so neatly delineated. Children and other dependents need far more than financial subsidies: They need caretaking to become flourishing adults. Because of this, children's interests can never be neatly disentangled from parents the way that Case suggests. Case's opposition to labor-market accommodation would therefore do more than impose a burden on parents—it would inevitably hurt children.

## II. The Supportive State and Relationships Between Adults

Accepting my argument that the state should support children's dependency needs does not lead inevitably to particular conclusions about how the state should treat relationships among adults. Unlike children, adults can generally order their relationships with others and can plan to meet their own dependency needs, at least to some extent. Does this mean that the state should, as some commentators argue, get out of the business of regulating relationships among adults by ending its current involvement in civil marriage and, in some states, civil unions?

For centuries, the state's putting its seal of approval on heterosexual marriage, and only heterosexual marriage, as the normative family structure was taken as a matter of course. In the last fifteen years, however, public agreement on this issue has collapsed. In its place, controversy has been brewing over the role the state should play with respect to intimate relationships between adults. This debate was catalyzed by recent state-court decisions striking down same-sex marriage bans,<sup>25</sup> as well as the

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<sup>25</sup> See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008);

political reaction to these decisions.<sup>26</sup> But it has been spurred on, as well, by the increasingly varied ways in which Americans organize their family lives.<sup>27</sup>

The emerging conversation has been complex. Some argue in favor of retaining traditional, heterosexual marriage.<sup>28</sup> Many others argue for change. Of these, some contend that marriage rights should be extended to same-sex couples.<sup>29</sup> Others maintain that the rights and privileges presently confined to married couples should be extended not only to same-sex couples but to cohabiting couples,<sup>30</sup> as well as to a variety of other relation-

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Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009). While the Hawaii Supreme Court's decision in *Baehr* declared its state's same-sex marriage ban to be suspect under the Hawaii Constitution, Hawaii voters amended the state constitution before the Hawaii Supreme Court finally ruled on the constitutionality of the same-sex restriction.

<sup>26</sup> This backlash began with the reaction to the decision in *Baehr*, 852 P.2d 44. Following *Baehr*, Congress passed the Defense of Marriage Act (DOMA) of 1996, which declares that no state must give effect to a same-sex marriage celebrated in another state, and that the term *marriage* for purposes of federal law is confined to the union of a man and a woman. Pub. L. No. 104-199 (1996) 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2001); 28 U.S.C. § 1738C (2001)). In addition, as of 2008, twenty-nine states had adopted state constitutional amendments that bar same-sex marriage, and of those states that did not adopt constitutional amendments, fifteen adopted legislation similar to the federal DOMA barring the state from recognizing a same-sex marriage celebrated in another state, see HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE LAWS (2008), available at [http://www.hrc.org/documents/marriage\\_prohibitions.pdf](http://www.hrc.org/documents/marriage_prohibitions.pdf) (last visited Mar. 7, 2010).

<sup>27</sup> See *supra* discussion in text at note 2.

<sup>28</sup> See, e.g., DAVID BLANKENHORN, THE FUTURE OF MARRIAGE (2007); COUNCIL ON FAMILY LAW, THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA (2005); RICHARD SANTORUM, IT TAKES A FAMILY: CONSERVATISM AND THE COMMON GOOD (ISI Books) (2005); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J. L. & POL'Y 581 (1999); William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYU L. REV. 961; Lynn D. Wardle, *Is Marriage Obsolete?*, 10 MICH. J. GENDER & L. 189, 223-24 (2003).

<sup>29</sup> See, e.g., WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE (1996); Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, 2 U. ST. THOMAS L. J. 5 (2004).

<sup>30</sup> See, e.g., AM. LAW INST. §§ 6.01-6.06 (2002); Grace Ganz Blumberg, *Unmarried Partners and the Legacy of Marvin v. Marvin: The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265 (2001); Ira Mark Ellman, 'Contract Thinking' Was Marvin's Fatal Flaw, 76 NOTRE DAME L. REV. 1365 (2001); Martha

ships.<sup>31</sup> Still others, including some gay rights advocates, believe that the state has no legitimate business privileging adult relationships at all, and that it should remove itself completely from sanctioning marriage and other intimate relationships.<sup>32</sup> It is this last position that I will discuss in this section.

A. *The Case Against Civil Marriage*

Queer theorist Michael Warner makes a powerful argument against gay rights advocates who seek to legalize same-sex marriage. Warner contends that the gay community’s current push for same-sex marriage runs the risk of requiring the wholesale “repudiation of queer culture’s best insights on intimate relations, sex, and the politics of stigma. . . .”<sup>33</sup> The ethical heart of these insights, Warner counsels, emerges somewhat paradoxically from queer culture’s experience with sex and its indignities:

[T]he ground rule is that one doesn’t pretend to be *above* the indignity of sex. . . . A relation to others, in these contexts, begins in an acknowledgement of all that is most abject and least reputable in oneself. Shame is bedrock. Queers can be abusive, insulting, and vile toward one another, but because abjection is understood to be the shared condition, they also know how to communicate through such camaraderie a moving and unexpected form of generosity. . . . The rule is: Get over yourself. Put a wig on before you judge. And the corollary is that you stand to learn most from the people you think are beneath you. At its best, this ethic cuts against every form of hierarchy you could bring into the room.<sup>34</sup>

Warner adds that this ethic “is actually truer to the core of the modern notion of dignity than the usual use of the word is. . . . Dignity in [this] sense is not pomp and distinction, it is inherent in the human.”<sup>35</sup> He argues that marriage is the means through which the state has historically sought to privilege and promote a

Ertman, *The ALI Principles’ Approach to Domestic Partnership*, 8 DUKE J. GENDER L. & POL’Y 107, 114 (2001).

<sup>31</sup> See, e.g., NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008); Judith Stacey, *Toward Equal Regard for Marriage and Other Imperfect Intimate Affiliations*, 32 HOFSTRA L. REV. 331, 340 (2003).

<sup>32</sup> See, e.g., FINEMAN, *supra* note 2; MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999).

<sup>33</sup> WARNER, *supra* note 32, at 91.

<sup>34</sup> *Id.* at 35.

<sup>35</sup> *Id.* at 36.

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particular, monogamous model of heterosexual sexuality, and to stigmatize all other ways of life as morally tainted. Warner, therefore, sees the expansion of marriage to same-sex couples as more of the same—the blatant imposition of the majority’s view of what is morally proper on the minority, and the denial of equal regard for the human dignity of all.<sup>36</sup>

Warner’s vision of state disestablishment of marriage skillfully weaves together many of the values properly respected in American tradition. Not only does he powerfully mobilize the call for human dignity and recognize that it encompasses a promise of equality for all, he also makes a powerful case for the individual autonomy that liberals hold dear: It is up to citizens rather than the state to determine what course in life is right for them; the state may not delegitimize some relationships and activities (such as sex outside of marriage) based solely on the private preferences of the majority. Somewhat less obvious but still a contributor to Warner’s account is the good of community. As Warner presents it, the recognition that all are partners in shame leads to a recognition of fellowship, a willingness to learn from one another, generosity and a spirited sense of community.

Yet Warner’s emphasis on human dignity cuts both ways. As I have argued, once the dependency of the human condition is taken into account, supporting human dignity requires not just protecting individual autonomy, but also supporting caretaking and human development. As our society is organized, some large portion of the caretaking that citizens need will come, if it comes at all, from those with whom we share close relationships.

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<sup>36</sup> *Id.* at 112. Warner argues:

[T]his kind of social engineering is questionable. It brings the machinery of administration to bear on the realm of pleasures and intimate relations, aiming to stifle variety among ways of living. It authorizes the state to make one form of life—*already normative*—even more privileged. The state’s administrative penetration into contemporary life may have numbed us to the deep coerciveness in this way of thinking. We take it for granted. Yet it is blind majoritarianism, armed not only with an impressive battery of prohibitions and punishments, but with an equally impressive battery of economic incentives and disincentives, all designed to manipulate not just the economic choices of the populace, but people’s substantive and normative vision of the good life.

*Id.*



Long-term caretaking relationships contribute particular, important benefits to the polity because they satisfy dependency needs in a way that casual sex between two (or more) persons—whether these people are straight, gay, bisexual, or queer—does not. There are, therefore, reasons for the state to privilege particular relationships that do not turn on the illegitimate, private preferences of some citizens. Although liberal suspicions about the danger of an overweening state are legitimate, the importance of support for caretaking should not preclude the state from acting to foster these relationships.

At the heart of the difficulties with the disestablishment approach is the fragility of its ethical base to accomplish the caretaking that must occur in any good society. The question is not whether Warner's vision is normatively attractive—it is in many respects. The important question, however, is whether state disestablishment of adult relationships could reasonably be expected to give rise to the responsibility and commitment that human dependency and the consequent need for caretaking entail. Warner dismisses the claim that his vision, as effectuated in queer culture, will lead to relativism, self-indulgence, or libertinism, arguing that queer culture polices itself, and the recognition of the common bond between queers creates a generosity and sense of ties among them that overcome these tendencies.<sup>37</sup> Yet, this sense of generosity and community seems far less likely to happen spontaneously in the more heterogeneous culture outside of queer life. Disestablishment advocates, then, are overly optimistic that the state's promotion of respect for all forms of life will lead to the committed ties that human dependency requires. Given their importance, a liberal democracy can and should be able to encourage the norms of commitment and responsibility that foster caretaking.

Some marriage disestablishment proponents base their argument not on the claim that the state should not be picking and choosing between different goods, as Warner does, but instead on the claim that privileging adult relationships is the wrong means to support particular goods. For example, feminist Martha Fineman supports disestablishment based on the same good that the pro-marriage advocates rely on: children's welfare.

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<sup>37</sup> *Id.* at 36.

Fineman argues, contrary to marriage advocates, that state support for the marital family ultimately redounds to children's detriment. In today's society, she points out, children grow up in a wide variety of family forms. A state that truly seeks to support the welfare of children, Fineman contends, would support child rearing in all the contexts in which it occurs, not just for children whose parents are married.<sup>38</sup> As a result, Fineman argues, the state has no legitimate stake in furthering relationships between capable adults, and therefore should abandon civil marriage as an institution. In the new regime she proposes, legal relationships between adults would be governed by private contracts negotiated between them.<sup>39</sup> This would leave marriage as a purely religious institution for those couples who choose to enter it, with no civil consequences.

In taking this position, however, Fineman does not credit the legitimate normative aspirations of the state. While the state should certainly focus attention on ensuring that all children are supported in their relationships with their parents, it may also aim higher and seek to promote those family forms that better foster children's welfare so that future children are born into sounder circumstances. Insofar as healthy, stable relationships among parents fosters children's welfare—and there is good evidence that this is the case—the state has good reasons to encourage these relationships. In doing so, though, it must still seek ways to protect existing children.

Moreover, Fineman, in arguing that the state should eliminate marriage as a civil status, ignores another legitimate reason that the state should encourage horizontal relationships. The fact of the matter is that it is not just children who need caretaking; adults do, as well. Most adults need caretaking intermittently during adulthood as a result of illness.<sup>40</sup> Further, a considerable

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<sup>38</sup> FINEMAN, *supra* note 2, at 140-41.

<sup>39</sup> *Id.* at xix; *see also id.* at 123.

<sup>40</sup> In 2005, 10.8 million people (4.7%) over the age of fifteen reported having one or more disabilities for which they required assistance with daily activities. *See* MATTHEW W. BRAULT, U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2005 4 (2008), available at <http://www.census.gov/prod/2008/pubs/p70-117.pdf> (last visited Aug. 5, 2009). In a report based on 2002 census data that considered the duration of disabilities, "more people reported needing assistance for one to five years (40.7%) than reported needing help for less than one year (23.3%) or needing help for more than five years (34.1%)." ERIKA

portion of adults will experience serious disabling conditions that leave them dependent for long periods of time, if not permanently.<sup>41</sup> And as they age and approach the end of life, most adults will become increasingly dependent on others for care.<sup>42</sup> When it comes to dependency issues, just as no family is an island, neither is any individual adult. Much of the caretaking needed by adults will come, if it comes at all, from family members.

The recognition of the importance of caretaking and human development, and their fundamental role in human dignity, gives the state reasons to support relationships among adults. There are also, however, other countervailing goods at stake. As Warner and Fineman both point out, a liberal democracy should respect individuals' choosing their own life courses, and should

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STEINMETZ, U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2002 7 (2006), available at <http://www.census.gov/prod/2006pubs/p70-107.pdf> (last visited Aug. 5, 2009)

<sup>41</sup> Data from the 2005 Current Population Report demonstrates that the number of adults requiring assistance for one or more daily activities increases for each subsequent age group: 1.9% for those twenty-five to forty-four, 3.4% for those forty-five to fifty-four, 5.7% for those fifty-five to sixty-four, 7.6% for those sixty-five to sixty-nine, 9.6% for those seventy to seventy-four, 16.1% for those seventy-five to seventy-nine, and 29.2% for those eighty and over. See BRAULT, *supra* note 40, at 3-4.

<sup>42</sup> See *id.* As the demographers at the U.S. Census Bureau summed up disability levels in the elderly population: "20% of older Americans have chronic disability, about 7-8% have severe cognitive impairments, and about 30% experience mobility difficulty. Census 2000 counted about 14 million civilian noninstitutionalized older people, representing 41.9% of the older population, who had some type of disability." WAN HE ET AL., U.S. CENSUS BUREAU, 65 + IN THE UNITED STATES: 2005, 59 (2005), available at <http://www.census.gov/prod/2006pubs/p23-209.pdf> (last visited Aug. 5, 2009) (citations omitted). Roughly 40% of adults aged seventy-five or older cannot perform one or more daily activities, such as meal preparation and eating, bathing, dressing, toileting, and walking or driving by themselves. NAT'L ACAD. ON AN AGING SOC'Y, CAREGIVING: HELPING THE ELDERLY WITH ACTIVITY LIMITATIONS 2 (2000), available at <http://www.agingsociety.org/agingsociety/pdf/Caregiving.pdf> (last visited Mar. 8, 2010). According to the Census Bureau, although the disability rates of the elderly population are declining, that population is on the threshold of a boom, as Baby Boomers begin to turn 65 beginning in 2011. By 2030, the population of senior citizens is expected to have doubled from its 2000 rates, growing from 35 million to 72 million, and representing 20% of the total U.S. population at the latter date. This will mean that there will be many more senior citizens with caretaking needs. HE ET AL., *supra*, at 60.

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vigilantly guard against the possibility that the majority will seek to use state power to impose its own beliefs on the minority without good public reasons to do so.<sup>43</sup> An adequate theory of relationships between adults needs to develop principles that take into account all these important goods, and that to the extent possible ameliorate the tension among them. Considering all of these goods and principles together yields a more complicated—but ultimately a better—picture of what the state’s role should be with respect to adults’ relationships.

#### B. *The Supportive State’s Framework for Relationships Between Adults*

What stance would the state take on relationships between adults if it considered the broad range of important goods and principles implicated in intimate adult relationships? There are actually two separate but related issues that must be considered with respect to the state’s approach to relationships. The first issue is whether the state should *recognize* relationships between adults for the purpose of assigning rights and responsibilities *between these adults*. The second is whether the state should *privilege* relationships between adults, in the sense that those who participate in these relationships should receive either *benefits from or rights against the state or third parties*. Both of these issues should be answered in the affirmative, in my view, although the issue of whether the state should recognize relationships is an easier one to answer than whether it should privilege them.

##### 1. *State Recognition of Adult-Adult Relationships*

When it comes to whether the state should recognize relationships between adults for the purpose of assigning rights and responsibilities between them, the answer is clearly “yes.” Although proponents of disestablishment such as Fineman have argued that relationships between adults would be better dealt with

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<sup>43</sup> John Stuart Mill’s harm principle, set out in his essay *On Liberty*, is probably the most well-known liberal explication of the legitimate limits of the state. See JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* 14 (John Gray ed., Oxford University Press) (1st ed. 1991). Likewise, Mill’s defense of individuality and the benefits to society from allowing freedom and experimentation remain classic evocations of this cluster of values. *Id.* at 74; see also *id.* at 120–21, 128.

through private contracts negotiated by the partners,<sup>44</sup> the interdependent nature of intimate relationships between adults, particularly when they are long-term, can create large economic inequities and imbalances of power in the absence of regulation.<sup>45</sup> In the face of these inequities, a state's failure to impose at least default rules on such couples, as Mary Shanley recognizes, would abandon the state's interest in securing justice and equality in these relationships.<sup>46</sup>

Those who advocate a regime of contract to regulate intimate relationships generally overlook serious difficulties that arise with respect to the fairness of such contracts. When persons contract about affective relationships they generally do not deal at arms length with one another. They may sometimes not zealously guard their own interests, out of concern for the other person or because of a mistaken (but extremely prevalent) belief that their own relationship will last for life. As a result, they may agree to an unfair contract. Furthermore, the courses of lives and relationships are often so difficult to predict that contracts entered into *ex ante* may not fairly and justly resolve what occurs *ex post*. In addition, in a regime of contract, those in a weaker bargaining position—traditionally women—may negotiate less favorable terms for themselves that will lead to inequality both in the course of the relationship and also if and when it ends. For these reasons, the state's establishment of a fair default position—for example, requiring that earnings by either partner dur-

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<sup>44</sup> See FINEMAN, *supra* note 2, at 123, 140-41.

<sup>45</sup> A large part of this inequality is caused by women's disproportionate assumption of caretaking responsibilities in heterosexual relationships. A number of researchers have sought to track the loss of earnings to women as a result of their unequal childrearing responsibilities, a loss that Ann Crittenden has dubbed the "mommy tax." See ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD* 82 (2001). Michelle Budig and Paula England estimate that mothers pay a penalty in wages of about 5% per hour for each child they bear. Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66(2) *AMERICAN SOCIOLOGICAL REVIEW* 204-25 (2001). In contrast, fatherhood increases men's earning prospects. Fathers are more likely to be employed, employed for more hours, and at higher hourly rates. See JANET C. GORNICK & MARCIA K. MEYERS, *FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT* 36 (2003).

<sup>46</sup> See MARY SHANLEY, *JUST MARRIAGE* 16 (2004).

ing the relationship be owned jointly by the partners—is a better alternative than requiring that partners bargain individually.

Moreover, in a regime that provided for no civil status for adult relationships, and in which such relationships were governed exclusively by contract, even those who negotiate unfavorable contracts could be lucky compared to those who negotiated no contracts at all. Some will have no contract because they could not afford a lawyer. Others will not because the motivation to express one's love publicly, which many would say is their motivation to enter marriage,<sup>47</sup> would not similarly impel them to enter into a contract to protect themselves against their partner. If and when these relationships end, the partners would have neither the default protections currently in place based on their status as spouses nor contractual claims against one another. Again this would operate to the detriment of primary caretakers, since they would have no claim to income earned by their partners during the relationship.<sup>48</sup> A regime in which the state recognizes relationships among adults for the purpose of apportioning rights and obligations fairly among them therefore better furthers the ends of fairness and justice than a regime of contract.

Of course, the state could assign rights and obligations based on the functional characteristics of the relationship even without providing couples with a route to formalize their relationships. For example, the American Law Institute's *Principles of the Law*

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<sup>47</sup> See *Goodridge*, 798 N.E.2d at 954–55 (“Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. ‘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’” (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965))).

<sup>48</sup> It might be argued, however, that although some individuals who enter into conjugal relationships may fare worse in the event of a breakup, if status-based marriages were eliminated, many other individuals would fare better because, in the absence of such recognition from the state, they would cease to enter into conjugal relationships altogether. Certainly Fineman and other commentators have suggested that women as a group would fare better if they avoided entering into marriage or marriage-like relationships with men. See FINEMAN, *supra* note 2, at 135. Whether or not this is the case, my strong hunch is that ending civil recognition will have little effect on the numbers of people who enter into conjugal relationships—they will simply do so without the imprimatur of the state or its protections.

of *Family Dissolution* imposes particular responsibilities on unmarried cohabitants whose relationships meet certain functional criteria.<sup>49</sup> In a regime in which civil marriage and other formalized commitments between adults were eliminated, a similar scheme could be applied to all couples. Under such an approach, the couple's functional characteristics—how long they lived together, whether they had children together, and so forth—could be used to determine the rights and responsibilities that each has with respect to the other.

Eliminating a civil route for formalizing relationships would still be a mistake for two reasons, however. First, this formalization helps to identify the intent of its members and their own understandings with respect to the intended primacy and permanency of the relationship. In entering into a marriage, participants indicate their assent to a specific formal status that comes with a set of enforceable legal rights and responsibilities.<sup>50</sup> And surely such understandings should be relevant in determining the default rules that apply to that particular relationship. For example, a commitment to a permanent relationship should be pertinent to the state's determination of whether and how long income should be redistributed between parties who have separated.<sup>51</sup>

Second, and still more important, the state's making available routes through which citizens can formally commit to the permanency and depth of their relationships serves the state's interest in increasing the stability of familial caretaking relationships. As Elizabeth Scott thoughtfully explains about civil marriage:

The formality of marital status, together with the requirement of legal action for both entry into marriage and divorce, clarifies the meaning of the commitment that the couple are making and underscores its seriousness. . . . The package of substantive legal obligations that goes with the formal status of marriage serves independently to promote stability in the relationship.<sup>52</sup>

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<sup>49</sup> AM. LAW INST. §§ 6.01, 6.03-6.06 (2002).

<sup>50</sup> See Elizabeth S. Scott, *Marriage, Cohabitation, and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225.

<sup>51</sup> See Marsha Garrison, *Is Consent Necessary?: An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815 (2005).

<sup>52</sup> Scott, *supra* note 50, at 241-43.

Providing routes for couples, as well as those in other forms of intimate relationships, to formalize their commitments thereby increases the likelihood these citizens will stay together to provide one another the care that each needs, establish a stable relationship in the event of children, and try hard to weather the difficult times with their partners.<sup>53</sup>

## 2. *State Privileging of (Some) Adult-Adult Relationships*

The supportive state should *recognize* relationships between adults for the purpose of assigning default rights and responsibilities among their participants, but should it also seek to *privilege* such relationships? In my view, the answer should be “yes” because of the goods that these relationships further. These privileges, however, must be limited in particular ways since they conflict with other important goods and values that we properly respect, including principles of autonomy and equality. A successful approach to regulating adult relationships must recognize this richer diversity of goods and ameliorate the tensions among them to the extent possible. The following four principles for the supportive state’s treatment of adult relationships together accomplish this purpose.

### a. *Freedom to Enter into Consensual Relationships*

The great respect we have for individual autonomy requires that the state give individuals the freedom to engage or not engage in consensual relationships with others. The right to determine one’s own personal relationships free from interference by the state is central to the value of individual self-determination

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<sup>53</sup> As the Law Commission of Canada’s important report, “Beyond Conjugality,” argues, there are a broad range of relationships that could benefit from the stability and certainty provided by state formalization of their relationships. LAW COMM’N OF CANADA, *BEYOND CONJUGALITY, RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS* (2002), available at [http://www.samesexmarriage.ca/docs/beyond\\_conjugality.pdf](http://www.samesexmarriage.ca/docs/beyond_conjugality.pdf) (last visited June 20, 2009). The report argues that the state should “provide an orderly framework in which people can express their commitment to each other and voluntarily assume a range of legal rights and obligations.” *Id.* at 113; see also Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 476-84 (1983).



and the human dignity on which liberalism is grounded.<sup>54</sup> Under this principle, for example, a citizen whose vision of the good life is to have sexual relationships with as many other citizens as possible should be able to fulfill that vision without interference by the state (barring issues such as public health concerns), regardless of the majority’s own private views. Although this goal in life may seem silly to many of us, and sinful to others, barring some legitimate public reason, the state has no grounds to proscribe this conduct. This principle would prohibit state criminal statutes still on the books in several states that outlaw fornication and cohabitation outside of marriage.<sup>55</sup>

b. *Support of (a Broad Range of) Long-Term Caretaking Relationships*

Although the state must tolerate all consensual relationships, it need not give all such relationships a level playing field. It is true, as Michael Warner argues, that the liberal democratic state should not favor some relationships over others based on citizens’ private notions of morality.<sup>56</sup> It can and should, however, seek to support relationships that further important public goods in which the liberal state has a legitimate interest. Given the dependency inherent in the human condition, it is not only autonomy that is necessary to support human dignity but also caretaking and human development. Supporting long-term relationships is an important way to further these goods. Without minimizing the violence and other harm that sometimes occurs in relationships between adults, or ignoring the sex inequality that

<sup>54</sup> This respect is incorporated into our jurisprudence. As Justice Kennedy stated in *Lawrence v. Texas*:

In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.

539 U.S. 558, 562 (2003).

<sup>55</sup> Four states currently retain such laws, although, after *Lawrence v. Texas*, their constitutionality is dubious: Florida, Michigan, Mississippi, and Virginia. FLA. STAT. § 798.02 (2009); MICH. COMP. LAWS § 750.335 (2009); MISS. CODE ANN. § 97-29-1 (2009); VA. CODE ANN. § 18.2-345 (2009).

<sup>56</sup> WARNER, *supra* note 32, at 112.

has marked heterosexual relationships, the crux of the matter is that dependency is an inevitable fact of life for adults as well as for children, and the state must contend with that fact. Because of its interest in the health, well-being, and dignity of its citizens, the liberal state has a vital interest in the success of relationships that foster caretaking, and should provide these relationships with the institutional support that will help them flourish.

Given that a primary reason for the state to privilege adult intimate relationships is caretaking, the state has an interest in supporting a considerably broader range of relationships than the heterosexual couples who now choose to marry. For example, the state has an interest in supporting relationships of nonmonogamous couples or, at the opposite end of the spectrum, those whose relationships are not sexual. By the same token, the state also has an interest in supporting caretaking in family groupings that involve more than two adults.<sup>57</sup> Thus, the state has valid reasons to support all the following horizontal relationships involving caretaking: two elderly sisters who live together and take care of one another, a nonmonogamous homosexual couple, a commune of five adults who live together with their children, and a heterosexual married couple.

*c. Limits on the Privileges Available to Long-Term  
Caretaking Relationships*

Promoting the health and stability of adult relationships is only one goal that a flourishing society should pursue, and only one of many principles that should influence the state's decision-making. State distribution of privileges in favor of these relationships, therefore, has to be weighed against alternative principles of distribution, including need. As I have argued, claims of current need should not monopolize the field when it comes to state action; a flourishing society must be able to act on aspirations for a better future, as well. For this reason, the state may provide certain benefits to encourage long-term relationships, even though those benefits may not reach those currently most in need. With that said, claims of need must still be given consider-

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<sup>57</sup> There may be administrative rather than theoretical reasons to limit the number of persons that the state should recognize. There is, however, no reason that two persons should necessarily be the limit.

able moral weight, and properly limit the privileges accorded these relationships, even if they do not bar them entirely.

The fact of the matter is that the state's attaching financial benefits to those who are members of certain forms of families, as the state does now with heterosexual marital families, continues to direct such benefits to those who have, on some number of measures, already been fortunate. Not all in society have an equal chance of getting and staying in such partnerships. Coming from a stable, well-to-do family significantly increases one's chances of doing so.<sup>58</sup> What's more, those citizens left out of such partnerships will likely be those who most need state benefits, including financial benefits. Because of economies of scale, adults in live-in relationships generally have an easier time financially than those who live alone.<sup>59</sup> Funneling privileges to those who have both the wherewithal and the happenstance to be in a committed relationship, therefore, steers societal resources toward those who have traditionally been the "haves," rather than the "have-nots." As Judith Stacey argues, "The more eggs and raiments our society chooses to place in the family baskets of the married, the hungrier and shabbier will be the lives of the vast numbers of adults and dependents who, whether by fate, misfortune, or volition, will remain outside the gates."<sup>60</sup>

In addition, the recognition of the limits on the state's ability to ensure the existence and stability of relationships must also be factored into the state's family policy. The state has only a moderate ability to encourage citizens to develop and maintain healthy caretaking relationships. Although it can establish certain institutional preconditions and incentives that support relationships, ultimately whether healthy relationships will develop and be sustained has a great deal to do with characteristics of the individuals involved and dumb luck, which are beyond the state's

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<sup>58</sup> While in the 1960s and 1970s it was believed that reduced rates of marriage, less stable relationships between adults, and nonmarital children were phenomena primarily relating to lower-class African Americans, social scientists are finding that this pattern was actually a trend in lower-income families more generally. See Frank F. Furstenberg, *If Moynihan Had Only Known: Race, Class, and Family Change in the Late Twentieth Century*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 94 (2009).

<sup>59</sup> See CRITTENDEN, *supra* note 45.

<sup>60</sup> Judith Stacey, *Toward Equal Regard for Marriage and Other Imperfect Intimate Affiliations*, 32 HOFSTRA L. REV. 331, 344 (2003).

ability to affect. Ignoring these limits on the state's competence can cause the state to overinvest resources when it only has a modest power to affect results. And its attaching too many incentives to such relationships can cause citizens to enter into and remain in them in name only or, worse, to remain in abusive relationships that the state has no good interest in supporting.

Further, the fact that healthy relationships depend on so many factors unrelated to individual desert is also reason to limit the benefits the state provides to relationships. Even if eligible citizens seek to marry, for many, entering and remaining in this institution will depend on circumstances that they cannot control. For example, one partner may simply decide that he or she no longer loves the other partner and leave, with no fault on the part of the other partner. The state's investing its resources only in marriage means that this wider group of citizens will, many through no fault of their own, be ineligible for these benefits.

These considerations should cause the state to limit the privileges that support relationships in two specific ways. First, state support of caretaking relationships between adults cannot undercut the state's responsibility to ensure that all its citizens have the financial ability and opportunity to pursue dignified lives. This means, at a minimum, that a just society should seek to deliver basic social goods, such as health care, to everyone in society, regardless of family membership. Insofar as the state distributes these goods based on a particular relationship status, it neglects its most basic responsibilities. Second, the state should limit privileges for relationships to those tied to the specific public goods in which the state has a legitimate interest—for example, caretaking or sex equality. Singling out families for more generalized favorable treatment, while it might still further the goal of encouraging and supporting families, stands in tension with principles of fairness and equality among all citizens, both those within and those not in such families, particularly insofar as the state redistributes economic resources to those who are, on average, better off.

Under this principle, the state may allow caretaking leaves from work, hospital visitation privileges for the families of sick citizens, and special immigration privileges for the partners of citizens, but may not allow general tax breaks for those in caretaking relationships that are unrelated to the extra expenses

incurred in caretaking. Thus the state would have little justification for funnelling general economic support to those in adult-adult relationships, given that these adults, on average, do better financially due to the economies of scale of living together. In contrast, economic redistribution to caretaker-dependent relationships could be better justified by the consideration of the cost to caretakers of caring for dependents, including the interruption from working continuously in the paid work force.<sup>61</sup>

One important way in which the state can legitimately foster relationships among adults that conform to this principle is, as I suggested earlier, by providing a civil route through which adults can formalize their commitment to others. These formal commitments increase the likelihood that a relationship will last. They also serve as an expressive vehicle for the state to announce its support for stable caretaking relationships without redistributing tangible privileges in favor of such relationships and, hence, away from those who might need them more. The state's endorsement of such formal commitments is still not, of course, without cost to those who do not enter them. To the extent that the state endorses such commitments, those who do not enter into them may feel a lack of societal respect or even societal disapprobation. However, given the importance of caretaking relationships, the stability that such formalization contributes to these relationships outweighs the costs of this potential stigmatization, in my view.

#### d. *Guarding Against Injury to Sex Equality*

Finally, the state must take account of the risks that supporting families can pose to other important goods. Specifically, any proposal that the state should promote intimate caretaking relationships must contend with the fact that heterosexual relationships, and especially the institution of heterosexual marriage,

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<sup>61</sup> Distributing resources generally to families with children, however, accords with distributing based on need. As Elizabeth Warren and Amelia Warren Tyagi demonstrate, "having a child is now the single best predictor that a woman will end up in financial collapse." ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* 6 (2003) (emphasis omitted). In their words, "married couples with children are more than twice as likely to file for bankruptcy as their childless counterparts." *Id.* They are also 75% more likely to be late in paying their credit card bills than a family with no children and far more likely to face foreclosure on their homes. *Id.* at 6–7.

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have been deeply intertwined with women's unequal status in society.<sup>62</sup> Leaving current political realities aside, the state might, of course, deal with this troubling association by privileging only those long-term caretaking relationships that do not involve heterosexual relationships, such as homosexual relationships or pla-

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<sup>62</sup> At common law, marriage was an institution premised on the hierarchical ordering of husband and wife. William Blackstone, who wrote an authoritative treatise on the laws of England, described the status in the following way: "By marriage," he wrote:

"[t]he husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing. . . . Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. . . . But, though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. . . . The husband also, by the old law, might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with his power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children."

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442-45 (1765); see also *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) ("So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state.").

Over time, this institution has gradually been stripped of this explicit hierarchical legal ordering, as well as of its gender-based legal duties. See, e.g., *Stanton v. Stanton*, 421 U.S. 7, 10, 14-15 (1975) (rejecting the "view" that "generally it is the man's primary responsibility to provide a home and its essentials" and noting that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas") (citation omitted). Yet both the cultural resonance still attached to marriage and the failure to adjust societal norms that reward a single-minded attachment to the workplace so that workers require partners at home who will take care of their households continue to place women in heterosexual relationships at a disadvantage to men. In contrast to heterosexual relationships, same-sex relationships generally demonstrate greater equality between the partners. See Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AM. PSYCHOLOGIST 6 (2006), available at [http://psychology.ucdavis.edu/rainbow/HTML/AP\\_06\\_pre.PDF](http://psychology.ucdavis.edu/rainbow/HTML/AP_06_pre.PDF) (last visited June 20, 2009).

tonic relationships. Alternatively, and far more palatable politically, the state could privilege heterosexual relationships along with other relationships, at the same time that it seeks to eliminate the inequality within these relationships.

One of the most important ways to pursue this latter option is for the state to adopt policies that encourage parents to share caretaking of children, since a large measure of gender inequality is associated with women assuming disproportionate childrearing responsibilities.<sup>63</sup> To accomplish this goal, the state should adopt a model of public support for caretaking that allows both parents to share equally in caretaking and in the paid workplace. For example, the state might require employers to adopt family leave and flex-time policies that can be taken by parents sharing child care between them. Public schools, too, could play a role in this endeavor, teaching children that both fathers and mothers should have equal roles in nurturing their children, and helping them to understand the importance of these caretaking tasks. In Anita Shreve's words, "the old home-economics courses that used to teach girls how to cook and sew might give way to the new home economics: teaching girls *and boys* how to combine working and parenting."<sup>64</sup>

### 3. Encouraging Two- (or More) Parent Families

There should be no question that a vigorous liberal democracy should be able to privilege some relationships over others for important public ends. And certainly creating a stable environment for children is such an important end. All other things being equal, close, stable family relationships are better for children than more distant or unstable relationships. Further, while many of the greater difficulties associated with single-parent families can be attributed to lack of adequate legal and social supports,<sup>65</sup> the trauma of a family breakup or divorce itself has

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<sup>63</sup> See *supra* at 2-3; see also Katharine T. Bartlett, *Brigitte M. Bodenheimer Memorial Lecture on the Family: Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 844-45 (1998).

<sup>64</sup> SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 177 (1989) (quoting ANITA SHREVE, *REMAKING MOTHERHOOD* 237 (1987)).

<sup>65</sup> See Nancy Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 34-35 (1995).

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significant consequences.<sup>66</sup> In addition, having the emotional and financial resources of two loving adults in the household available to the child, again, all other things being equal, is better than having the resources of just one.<sup>67</sup> This gives the state a legitimate interest in preferring two-parent (or more) families to single-parent families.

The issue of *how* the state may seek to encourage such multiple parent families is a difficult one, however. The state's duty to ensure that vulnerable children have the caretaking and other resources necessary to meet their basic dependency needs and to promote an adequate level of human development exists whether or not the state believes that parents have made a wise choice about their family form. And it exists even if the state fears that ensuring that today's children have necessary resources will send the wrong signals about better and worse family forms and thereby hurt future children: This duty to support existing children adequately is inviolable; liberal democracy's fundamental commitment to the dignity of each individual does not allow it to trade off the basic needs of current vulnerable citizens' for possible gains to future citizens. Because of it, for example, the state may not withhold welfare benefits to low-income families based on their mothers having additional children out of wedlock, if doing so would deprive the children in these families of necessary resources.

Above this required threshold of support, however, the state has good reasons to adopt measures that encourage and seek to stabilize multiple-parent families. In choosing among such measures, the state should still seek to harmonize important goods at stake. In other words, the state's goal should be to construct policies that avoid zero-sum situations in which furthering some goods operates to the detriment of others. Developing such poli-

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<sup>66</sup> Gary Painter & David I. Levine, *Family Structure and Youths' Outcomes: Which Correlations are Causal?*, 35 J. HUM. RESOURCES 524 (2000).

<sup>67</sup> See SARA McLANAHAN & GARY SANDEFUR, *GROWING UP IN A SINGLE-PARENT FAMILY: WHAT HURTS, WHAT HELPS* (1994); Thomas Deleire & Ariel Kalil, *Good Things Come in Threes: Single-Parent Multigenerational Family Structure and Adolescent Adjustment*, 39 DEMOGRAPHY 393 (2002); Leslie N. Richards & Cynthia J. Schmiede, *Problems and Strengths of Single-Parent Families: Implication for Practice and Policy*, 42 FAM. RELATIONS, July 1993, at 277.



cies will require careful attention to the ways in which relevant goods may conflict.

By this criterion, the state's seeking to further two-parent families by awarding them economic resources not awarded to single-parent families is a peculiarly bad tool to harmonize these goods, since doing so keeps resources from the families who need them most and therefore increases inequality.<sup>68</sup> The state would do better to adopt measures that do not pose such stark trade-offs. For example, the state could encourage multiple-parent families by providing job-training programs and educational subsidies for youths who are at risk of becoming parents, since studies show that increasing the prospects for young adults' futures makes it significantly less likely that they will bear children while they are young and single.<sup>69</sup> Such programs do not directly pit the important interests of current children against those of future children, and also have the virtue of increasing equal opportunity.

Along the same lines, the state should treat proposals that seek to strengthen marriage by making divorce more difficult, such as proposals that seek to return to fault divorce laws, with a skeptical eye. Tightening up divorce laws by returning to fault divorce, despite furthering the state's interest in promoting marriage, would severely infringe on citizens' autonomy interests. The state would, therefore, do better to adopt proposals such as

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<sup>68</sup> As Ann Crittenden notes, single-parent families are generally in a far worse economic position than two-parent families because of the simple fact that, when parents live apart, two households are much more expensive than one. According to Crittenden,

In one study researchers found that after divorce a family will need about one-third more income in order to maintain its previous standard of living. According to another researcher, if a family's total income stays the same, "the couple can expect a drop in standard of living between 21 and 26%, depending on the number of children and how they are divided between the parents."

CRITTENDEN, *supra* note 45, at 150.

<sup>69</sup> See Marian Wright Edelman, *Preventing Adolescent Pregnancy: A Role for Social Work Services*, 22 URB. EDUC. 496 (1988) ("New analysis of national survey data . . . shows that minority and white birth rates are essentially the same if we control for income and basic skills deficits—'shortfalls that reduce teens' life options.'"); see also KRISTEN LUKER, *DUBIOUS CONCEPTIONS: THE POLITICS OF TEEN PREGNANCY* (1997).

premarital counseling requirements that would avoid this stark trade-off of goods.<sup>70</sup> By the same token, as Linda McClain argues, many marriage-promotion policies risk perpetuating sex inequality within marriage.<sup>71</sup> Given that women more often seek divorces than men, the state could usefully support such relationships by encouraging men to be better partners by assuming an equal share of housework and carework.<sup>72</sup> Such measures would infringe less on individuals' autonomy than stricter divorce laws and, at the same time, increase sex equality.

In determining the measures that the state should take to further such relationships, it is important to keep in mind the limits of the state's institutional competence to deal with the complexities of these relationships. The state can make it more difficult for individuals to get out of marriage; it cannot, however, keep affection and caretaking alive within such relationships. In those cases in which parents' relationships with one another are unsuccessful, rather than attempting to keep them in

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<sup>70</sup> Covenant marriage laws, in which individuals getting married can choose whether or not heightened standards will apply at divorce, also pose less of a conflict among important goods. See ARIZ. REV. STAT. § 25-901 -906 (2000 & Supp. 2004); ARK. CODE ANN. § 9-11 -811 (2002 & Supp. 2003); LA. REV. STAT. ANN. § 9:272 -276 (2000 & Supp. 2005). Given the small number of couples who choose to enter into covenant marriage where it is available, though, as well as the problems with requiring parties to remain in a marriage that one party wants to exit, the state would be wise to seek alternative policies. See Scott Drewianka, *Civil Unions and Covenant Marriage: The Economics of Reforming Marital Institutions*, U. Wis., Mar. 2003, available at <http://www.uwm.edu/~sdrewian/MEApaper2003.pdf> (last visited Mar. 16, 2010). In Louisiana, 2%, in Arizona, 0.25%, and in Arkansas, only 71 out of approximately 38,000 marrying couples elected the covenant marriage option during the first year (2001-2002) of its availability. *Id.*

<sup>71</sup> See LINDA C. McCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 131-54 (2006).

<sup>72</sup> See Bartlett, *supra* note 63, at 842. Bartlett cites figures from a 1986 study, which indicate that women initiate divorce in 62-67% of cases, *id.* at 842 n.135. A more recent study gives approximately the same result, placing the figure at slightly above two-thirds. See Margaret F. Brinig & Douglas W. Allen, *These Boots Are Made for Walking: Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV., Issue 2, 126, 127-28 (2000). More recent data on the division of household responsibilities indicate that married mothers perform an average of 19.4 hours of housework per week, while married fathers perform an average of 9.7. See SUZANNE M. BIANCHI, JOHN P. ROBINSON, & MELISSA A. MILKIE, *CHANGING RHYTHMS OF AMERICAN FAMILY LIFE* 116 (2007).

the marriage, the state's efforts should focus on ensuring that both parents have a continued, meaningful role in the child's life. As courts and commentators have increasingly recognized, the fact that two adults divorce one another does not mean that one of them must also divorce the child.<sup>73</sup> The state's goal in this situation should be, insofar as it is possible, to facilitate harmonious parenting relationships between both parents and the child. At the top of the list of policy changes that the supportive state should make to pursue this goal should be moving family courts away from litigation as the standard model to resolve divorce disputes, since it heightens animosity between the parties, and toward a model, such as collaborative dispute resolution, which facilitates cooperation between the parties.<sup>74</sup>

In sum, regulation regarding adult intimate relationships is so difficult because these relationships implicate a number of goods that are central to American ideals—and which, at best, jibe uneasily with one another. Each of these goods—human dignity, autonomy, equal opportunity, sex equality, children's welfare—is too important to be sacrificed to any of the others. By the same token, none ranks so supreme that it should be deemed completely to trump the others. What is called for, then, rather than focusing on a single good or two and ignoring the others, is a family policy that stitches the relevant goods together into a more nuanced set of principles that allows each of these goods to be given its due.

### III. Family Privacy and the Supportive State

I have argued that the state must actively support families, rather than be neutral to them. But what role should remain for the doctrine of family privacy once we discard the notion that families should be left to their own devices? In this section, I outline the important role that a revised version of family privacy, conceived in terms of autonomy of decision-making, should play in the supportive state.

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<sup>73</sup> See JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* (2000).

<sup>74</sup> See Clare Huntington, *Repairing Family Law*, 57 *DUKE L.J.* 1245 (2008); Patrick Parkinson, *Family Law and the Indissolubility of Parenthood*, 40 *FAM. L.Q.* 237 (2006).

*A. From Family Inviolability to Decisional Autonomy*

The notion that there can and should be an unbreachable delineation between the public world and the private home is, as I have argued, a myth. In contemporary society, there is simply no possibility of constructing a zone that is completely free of the state's interference, no so-called "normal" operation of a family that stands completely apart from state action. The state is so omnipresent in family formation and functioning that, as Frances Olsen charges, the very concept of state intervention in families is itself incoherent.<sup>75</sup> The role of the state with respect to families may be more or less obvious or more or less coercive, but the state always plays some role within families in contemporary society.

Even if the ideal of a complete separation between public and private were attainable, it would be normatively problematic. Feminists have shown how the strict demarcation between the public and private realms as the boundary for state action has served to perpetuate women's inequality in families and in society.<sup>76</sup> They have pointed out that the way that the doctrine of family privacy has generally been framed by courts, in walling off families from the reach of the state, has preserved the freedom of some at the cost of the oppression of others.<sup>77</sup> This doctrine is justified on the assumption that, in the absence of state action, citizens exercise considerable freedom in this realm. Insofar as inequality and other constraints prevail in this realm, though, keeping the state out simply allows these inequalities and con-

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<sup>75</sup> Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1510 (1983).

<sup>76</sup> Catharine MacKinnon eloquently describes its flaws:

[W]hile the private has been a refuge for some, it has been a hellhole for others, often at the same time. In gendered light, the law's privacy is a sphere of sanctified isolation, impunity, and unaccountability . . . Everyone is implicitly equal in there. If the woman needs something—say, equality—to make these assumptions real, privacy law does nothing for her.

Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991); see also CAROLE PATEMAN, *Feminist Critiques of the Public-Private Dichotomy*, in FEMINISM AND EQUALITY (A. Phillips ed., 1987); Olsen, *supra* note 75, at 1510.

<sup>77</sup> MacKinnon, *supra* note 72, at 1311.

straints to go unchallenged.<sup>78</sup> For this reason, the doctrine of family privacy has, in Catharine MacKinnon's words, functioned a lot like the "right of men 'to be let alone' to oppress women one at a time."<sup>79</sup>

Despite the way this doctrine has often functioned in practice, there still exists an important concern at the heart of the notion of family privacy that deserves continued respect, which harks back to the central liberal notion of autonomy. The view that dignity for humans requires the ability to be self-directing, in the sense of making important decisions about the course of their lives, is central to the justification for privacy. As Justice Brennan said in crafting the constitutional doctrine of privacy, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>80</sup>

While recent constitutional doctrine has generally conceived this decisional autonomy to attach to individuals, there are strong reasons to accord this autonomy to families as well. Doing so recognizes the important role that they play in the fabric of a flourishing society. Citizens do not live their lives as atomistic individuals who construct institutions from scratch as an exercise of their individual autonomy, as simplistic social contract reasoning might suggest. Instead, they live their lives in and through institutions that organize and give meaning to their lives; among these institutions, families play a central role.

Transmuting the current, blanket conception of family privacy into a zone of protection for families' decisional autonomy shifts the state's role. No longer is the appropriate behavior from the state to withdraw completely from the realm of family life (already an impossible goal); instead it is to ensure that families have the means and wherewithal to make important decisions for themselves. Like the old doctrine of family privacy, some of what this requires on the part of the state is forbearance in directing the decisionmaking of families. Under this revised view,

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<sup>78</sup> Reva Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2170 (1996).

<sup>79</sup> CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 53 (1991).

<sup>80</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

decisions about the way in which individual families function or the lives of their members should generally be left to the family itself. Absent compelling reasons, the state should not be able to dictate what occurs in families. Where the state has an important interest in the outcome, however, it may seek to use gentler means to persuade families. For example, though Twinkies may not be a part of a sound diet for children (particularly given the recent obesity epidemic), the state has no business prohibiting parents from serving them for dessert, absent a showing that serving them even occasionally will cause a serious and substantial threat to their children's health. The state, however, may still tax Twinkies to give parents a disincentive to buy and serve them.

Yet support for familial autonomy requires more than the state's forbearing from dictating family decisions. The state must also seek to ensure that families have the wherewithal to exercise this autonomy. Not only does this mean helping ensure that families have the capacity to make important decisions about their family, it also means that families have some reasonable means to effectuate their decisions. While the primary threat to such autonomy has long been seen to come from the state, much of today's threats of encroachment on decision making come from the market. The danger is not that the market will coercively compel or prohibit certain types of families or decision making in families, the way the state might prohibit family members from using birth control or prohibit the decision by loved ones to take a family member in a vegetative state off life support. Instead, the threat from the market comes from the risk that families will be so much at its mercy that they cannot exercise meaningful choice with respect to how to accomplish important activities such as caretaking. The condition in which one is forced to sell the bulk of one's waking hours and to sacrifice the majority of one's family time to put food on the table, a roof over the head of family members, and provide medical care if they should get sick poses as great a risk to family autonomy today as an overweening state did in past times.

A revised doctrine of privacy should, therefore, focus on limiting coercion by the market, as well as creating resources and space to ensure decisionmaking autonomy for families. Measures that establish an upper limit on mandatory working hours, allow employees paid time off for caretaking, prohibit parents of

young children from being fired for refusing to work overtime, and enable workers to work flexible hours are some of the many measures the state can use to prevent this encroachment.<sup>81</sup> These measures allow families the institutional space to make important decisions and to accomplish important tasks without being completely beholden to the market.

Although the rationale of family privacy was long used to justify the state's failure to redress oppression within families, a reformulated doctrine can and must do a better job of reconciling family autonomy with the autonomy interests of family members. In some instances these interests will align. Thus, the demands by mothers on welfare in the 1960s that the state discontinue its midnight searches for men in their homes presented a situation in which individual and family interests in decisional autonomy coincided.<sup>82</sup> Similarly, individual privacy and family privacy interests generally run in tandem when women raise rights to privacy to support their claims for keeping abortion legal.

On other occasions, however, family privacy may collide with the autonomy interests of individual family members. For example, one family member may seek state intervention either for self-protection or to resolve a disagreement between members. Where coercion exists or there are threats to the safety of one of the members, or where criminal or tortious conduct among family members is at issue, the doctrine of family privacy must give way: The supportive state values family privacy, but never absolutely. It must therefore yield when the physical or emotional wellbeing of family members are threatened. By the same token, family privacy cannot stand as a justification where the fundamental rights of a family member are at stake. Thus, the state may not legitimately require a pregnant woman to obtain her husband's consent to get an abortion based on the rationale of family privacy, given that to do so would critically infringe the woman's own fundamental right to privacy. What is more, in a situation in which a husband tries to prevent his wife from aborting a pregnancy, family privacy will not justify the state's failure to intercede in order to allow a wife to obtain an abortion, if she seeks the state's assistance.

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<sup>81</sup> See GORNICK & MEYERS, *supra* note 45, at 27-28 (2003).

<sup>82</sup> See generally Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L. J. 1347 (1963).

Short of these instances, however, a revised doctrine of family privacy requires a more nuanced approach. The state's general assumption should be that adults in an intact relationship will work out decisions among themselves without state intervention. This assumption accords with the American tradition of family privacy and concerns for judicial economy and judicial competence: courts generally should not have to expend the resources to decide these issues, and are not as well positioned as members of a family to decide them. Even when members of a couple disagree about important issues, the general rule should be that they should figure out how to resolve these disputes for themselves. This is the case, for example, where members of a couple disagree about which school in which to enroll their child: They should resolve this dispute privately. Should the parents become so stalemated that they decide to end their relationship, assuming that the parents are awarded joint legal custody, resolution of the school dispute by a court would then be appropriate.

#### B. *Decisionmaking Autonomy and Equality within the Family*

The state's removing itself from these decisions, however, can be justified only if adult family members have a relatively equal say in the decisionmaking. This in turn requires that they have relatively equal power within the relationship, as well as an adequate opportunity to exit it should they wish. To ensure an adequate opportunity to exit for all adult family members, the supportive state must ensure that the costs of the breakup, including any reduction in standard of living, are shared fairly. Although no-fault divorce has, as a legal matter, made access to divorce easier for parties seeking to leave marriages, divorce still has substantial costs that are not imposed equally on the partners. The standard application of alimony and equitable distribution laws in the United States vastly favor the primary breadwinner over the other spouse; financial considerations, therefore, make it significantly more difficult for spouses who have been primary caretakers—generally women—to leave marriages.<sup>83</sup> Furthermore, those women who have been homemak-

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<sup>83</sup> For a perceptive discussion of how application of alimony and equitable distribution laws disadvantage mothers, see CRITTENDEN, *supra* note 45, at 149.



ers during a marriage return to the workplace at a significant disadvantage because they have invested their human capital in their families, rather than in skills deemed marketable in the workplace. These disparate costs of exit can influence the balance of power within the relationship, because the party who can more easily exit can use this advantage to set the terms of the relationship. The state must therefore alter these terms of exit to ensure that the doctrine of family privacy does not deprive one party to the relationship of his or her voice.

Yet the state cannot rely solely on the equal opportunity to exit to ensure that members of relationships have sufficient autonomy for application of the doctrine of family privacy. Even when the terms of exit are fair, the fact of the matter is that there are many nonlegal barriers to existing relationships. Deep and pervasive cultural and religious norms associated with marriage impose their own restrictions on leaving the union.<sup>84</sup> In addition, bonds of love and affection may prevent exit, as may concern for the welfare of children of the relationship. As a consequence, the supportive state's ensuring fair terms of exit is necessary but not sufficient to uphold family privacy; the state must also seek to support equality within extant relationships.

Currently, the inequalities that are tied to caretaking versus breadwinning roles apply not only if a couple separates, but during the marriage, as well. Under common-law property rules that apply in a majority of states, during an ongoing marriage, one partner has no access to property earned by the other partner.<sup>85</sup> In this regime, whoever earns the paycheck is the owner of these funds during the marriage; that person has the exclusive right to control these funds. This means that the primary breadwinner in a family has more power to decide financial issues than does the primary caretaker, and, given the prevailing gender divide with respect to caretaking, that men generally still have more economic power in relationships than women.<sup>86</sup>

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<sup>84</sup> See Scott, *supra* note 50, at 225; see also Joseph Veroff et al., *Predicting Marital Quality with Narrative Assessments of Marital Experience*, 55 J. MARRIAGE & FAM. 326, 326–37 (1993).

<sup>85</sup> See IRA ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 213-14 (5th ed. 2010).

<sup>86</sup> See Nancy Burns et al., *The Public Consequence of Private Inequality: Family Life and Citizen Participation*, 91 AM. POL. SCI. REV. 373 (1997). In a

The problematic relationship between family privacy and individual autonomy is dramatically presented in the case of *McGuire v. McGuire*, which was decided in 1953, but is still good law today.<sup>87</sup> In that case, the Nebraska Supreme Court refused the petition of a wife in an ongoing marriage who sought to have the state enforce the legal duty of her husband to adequately support the household. Her husband, a well-to-do farmer, refused to provide the household with such basic items as a bathroom, inside toilet, and kitchen sink, and had not allowed his elderly wife money to buy clothes or any household items besides food in the last several years, although she had met her marital obligations to maintain the household. In ruling that judicial intervention was inappropriate, the court stated that “[t]he living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband’s attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf.”<sup>88</sup> In relying on this rationale, however, the court ignored the fact that the “household’s” decision would in actuality be made solely by the husband, since as the breadwinner in a common-law property state, he controlled the purse strings of the household.

The supportive state, in contrast, should apply the doctrine of family privacy as a reason to decline to intervene in extant relationships when an adult family member seeks intervention only insofar as it ensures that the legal backdrop against which marital relationships function promotes the equalization of the power of adults within relationships.<sup>89</sup> This means the state should move toward extinguishing common-law property rules that give the spouse an interest only in property that she earns herself, and move toward the rule currently applied in community property states, which holds that parties in a marriage jointly own the property earned by either of them during the marriage.<sup>90</sup>

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study of 380 married couples, almost 75% of the husbands surveyed reported “taking all or most of the responsibility for big financial decisions.” *Id.* at 376-78.

<sup>87</sup> *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953).

<sup>88</sup> *Id.* at 342.

<sup>89</sup> Lee Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 UTAH L. REV. 537.

<sup>90</sup> Three community property states currently require equal division of property between spouses: California, Louisiana, and New Mexico. *See CAL.*

While couples should be able to opt out of these default “background rules” as an exercise of their autonomy, the default rule should favor equality of power.<sup>91</sup>

## Conclusion

In sum, it is time to abandon the notion that families can or should function completely on their own. Government, it should be recognized, has an essential place in supporting families’ in their important tasks of caretaking and furthering human development. Because of the important role that these tasks play in the lives of flourishing citizens and a flourishing society, a government committed to human dignity must do more when it comes to families than simply seek to adopt a position of neutrality. It must, instead, actively seek to construct a network of policies that support families and the caretaking and human development functions that they fulfill.

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FAM. CODE § 2250 (West 2009); LA. REV. STAT. ANN. § 9:2801(4)(b) (West 2009); *Ruggles v. Ruggles*, 860 P.2d 182, 188 (N.M. 1993).

<sup>91</sup> The term is Lee Teitelbaum’s. See Teitelbaum, *supra* note 89, at 559.

