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A Family Like Any Other Family: Alternative Methods of Defining Family in Law

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NOTES

“A FAMILY LIKE ANY OTHER FAMILY:” ALTERNATIVE METHODS OF DEFINING FAMILY IN LAW

KRIS FRANKLIN*

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INTRODUCTION: WHAT IS A FAMILY?

- Marjorie Forlini and Sandra Rovira lived together for over twelve years with their two sons from Rovira’s previous marriage. They considered themselves a family. In 1977, Forlini and Rovira formalized their relationship by exchanging rings and vows in a ceremony before their friends and relatives. Though she had no biological ties to their children, Forlini participated in their upbringing and declared them as dependents on her tax returns. After Forlini’s death in 1988, Rovira sought surviving partner’s benefits from Forlini’s employer. She was denied payment based on their lack of le-

* B.A., 1989, Yale University; J.D., 1992, New York University School of Law (expected). My gratitude goes to Professor Peggy Davis and Julie Novkov for reading and commenting on numerous drafts of this Note. Most of all, I would like to thank Sarah Chinn, who worked to complete this project, and who completes my family.

gally-recognized ties.¹

- Ninety-three-year-old Henry Pittman died in 1986, after sharing an apartment for twenty-five years with Annette Baxter and her son Jimmie Hendrix. Though at first Hendrix was only a boarder in Pittman's home, he and his mother quickly began living as a family with Pittman. Since neither was legally related to Pittman, upon his death they faced eviction from their Harlem apartment. With the help of the Legal Aid Society, they challenged their landlord in court, where their household was held to have constituted a family unit, based on Judge Alice Schlesinger's finding that their "relationship developed into one of devoted concern, sharing, trust, loyalty and love."²

- Chris Florence, a twenty-three-year-old student in Lexington, Kentucky, is a bisexual man who lives with his female lover of six years and his male lover of three years. The group is open about the relationships they share with each other, but report that their family status is respected by neither their heterosexual peers nor the lesbian and gay community in which they are active. Florence is legally entitled to marry his female partner, but could not secure formal recognition of his relationship with his male partner. He points out that the legalization of gay marriage would not include legal protections for his family, since prohibitions against bigamy would still prevent their joint union.³

- Edna Freimuth, Winnie Honsinger, and Austin Lederer live together with eleven other elderly people in a large home in Ridgewood, New Jersey. In order to insure privacy, each resident has her own room within the household, though all share common kitchen and recreational space. Members of the household care for one another, and work together to take care of their home. Residents often act as family members; some refer to other residents as "sisters." Winnie Honsinger, an eighty-eight-year-old member of the household, explains: "we are a family; we are compatible and enjoy living together."⁴

- Paul and Jane, sixty and sixty-four, respectively, live together in a large frame house on the outskirts of a large suburban area. Though the two have been partners for over seven years and have an ongoing commitment to one another, they have never legally married. This lack of legal status serves to deny the couple many privi-

1. *Suit Over Death Benefits Asks, What Is a Family?*, N.Y. Times, Sept. 21, 1990, at B7, col. 3.

2. *What Is a Family? Traditional Limits Are Being Redrawn*, N.Y. Times, Aug. 31, 1989, at C1, col. 2.

3. Letter from Chris Florence, *OUTWEEK: THE LESBIAN AND GAY NEWS MAGAZINE*, Mar. 20, 1991, at 6-7.

4. *Five of Today's Families*, N.Y. Times, Aug. 31, 1989, at C6, col. 1.

leges accorded to wedded spouses, but both partners reject marriage as a required institution for intimacy. They note that a marriage license would add nothing to their commitment to one another. Paul reports "[w]e always know we'll be together because we want to be together and not because any law says we've got to be."⁵

Do these creative forms of relationships constitute families? In recent years, defining what is meant by "the family" has become an increasingly arduous process. Families have long been viewed as among the most essential and universal units of society. This sense of the shared experience of family has led to an often unexamined consensus regarding what exactly constitutes a family. Thus, while "[w]e speak of families as though we all knew what families are,"⁶ we see no need to define the concepts embedded within the term.

The immediate connotation of the word "family" for most Americans would probably be quite similar to the one that the National Pro-Family Coalition adopted at the 1981 White House Conference on Families. The Coalition's statement proposed that a family consists solely of "persons who are related by blood, [heterosexual] marriage or adoption."⁷ Such a formulation usually exemplifies the "traditional" notion of family. Regardless of whether we accept this model as relevant to our own experience, its preeminence in Western societies has been clearly established.⁸

The relatively universal recognition of a single normative conception of the family, however, has not prevented alternative descriptions of the institution from gaining acceptance. For example, the American Home Economics Association (AHEA) adopted a definition of family that explicitly rejects the traditional formulation and instead offers the following definition: "two or more individuals who share goals, resources and a commitment over a period of time."⁹ The AHEA definition emphasizes its break with traditional interpretations, noting that "[t]he family is that climate that one 'comes home to' and it is this network of sharing and commitments that most accurately describes the family unit, regardless of blood, legal ties, adoption or marriage."¹⁰

5. P. BLUMSTEIN & P. SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX* 407-17 (1983).

6. R. LAING, *THE POLITICS OF THE FAMILY AND OTHER ESSAYS* 3 (1971).

7. National Pro-Family Coalition on the White House Conference on Families, in *NATIONAL ORGANIZATIONS RESOURCE BOOK* (1981). Although the Pro-Family Coalition does not specify heterosexuality as a necessity for marriage, the adjective is included in brackets in the definition because such a belief is implied in the statement.

8. F. ELLIOT, *THE FAMILY: CHANGE OR CONTINUITY?* 4 (1986). Moreover, when discussing the "traditional family," many writers feel no need to define the term. See, e.g., Note, *Broadening Anachronistic Notions of "Family" in Proxy Decisionmaking for Unmarried Adults*, 41 *HASTINGS L.J.* 1029 (1990). Likewise, the name "Pro-Family Coalition" itself suggests a certain ideology, though there are no indices of political alignment in the title. See Langway, *Family Politics*, *NEWSWEEK*, Jan. 28, 1980, at 78-79 (characterizing Pro-Family Coalition as politically conservative).

9. AHEA adopted this definition in 1973. Diamond, *Introduction*, in *FAMILIES, POLITICS AND PUBLIC POLICY: A FEMINIST DIALOGUE ON WOMEN AND THE STATE* 1, 8 (1983).

10. *Id.*

Many groups of individuals within the same household could be accurately described by both of these formulations of family. It is nevertheless interesting to examine the ways in which they overlap and differ. The Pro-Family Coalition's definition excludes committed relationships established by unmarried heterosexual partners and lesbian, gay, or bisexual¹¹ partners, as well as any children in their relationships.¹² Also left out of the Pro-Family Coalition's definition are "marriages" or commitments among more than two adults and relationships between stepparents and stepchildren — even though such individuals might very strongly identify themselves as being family members of one another.¹³ By the same token, people closely associated by blood or marriage, such as parents of adult children, nephews or nieces, and so on, might not be considered family members under the AHEA definition if they do not sufficiently share their lives with one another or lack a conscious commitment to each other.

Of course, these definitions are not necessarily mutually exclusive. Many of the families recognized by the AHEA definition would fit within the Pro-Family Coalition guidelines, and vice-versa. But neither of these rubrics on its own incorporates every possible permutation of family, nor can any single formulation of family fully explore the social conventions and complexities upon which each is based. Each formulation uses the term "the family" without acknowledging its multiplicity of possible meanings. Moreover, no current definition recognizes the central distinction between "family" as a network of kin — that is, members of a larger extended family related by blood and marriage, also known as "family of origin" — and "family" as a nuclear unit, the

11. I include bisexual people in this category out of a recognition of bisexuality's unique effect on family formation. Throughout this Note, however, I refer to heterosexual partners, lesbian and gay partners, and members of multi-adult families (regardless of gender), without specifically including recognition of the different experiences of bisexual men and women. I intend these adjectives to describe the genders of the partners, rather than their sexual orientations; thus, the romantic/sexual relationships of bisexual people at any given point may be included within one or more of the above descriptions. I do not wish to minimize the importance of bisexual orientation, but because this question does not directly impact on the legal examination of alternative family definitions, discussion of the unique effect of bisexual orientation on family forms is beyond the scope of this inquiry.

12. Members of lesbian or gay partnerships often take responsibility for children who either were consciously sought within those relationships or conceived within a prior heterosexual relationship. A recent national survey reports that 21% of partners in lesbian couples and 9% of partners in gay couples care for children, and that members of one-third of all lesbian or gay partnerships in which the adults are younger than 35 plan to have children at some point in their lives. *Partners' National Survey of Lesbian and Gay Couples*, PARTNERS: THE NEWSLETTER FOR GAY & LESBIAN COUPLES, May-June 1990, at 10 (on file with author).

13. An ironic and probably unintended result of the Pro-Family Coalition definition is that some persons who might expect to be considered unrelated might be considered "family" by virtue of the limitlessness accorded blood, marriage, or adoptive ties. For example, the biological parents of a child given up for adoption could be family to the newly adoptive parents through the common child: the biological family is related by blood to the child, the child by adoption to the other family, and both separate families to each other by "blood and adoption" through the child.

“family of procreation” or “family of choice.”¹⁴

Our general cultural notion of family arose in an era of little geographic mobility, and thus included those of whom we thought as kin and among whom we presumably lived. However, a shift in Western ideology has increasingly focused on the ideal living situation as the traditional “nuclear” family: two heterosexual married adult partners cohabiting with their biological or adoptive children. This is reflected by the fact that several of the present definitions of family elide the concept of kinship as a form of family; thus, “family” has in these instances come to indicate only “family of choice.” The existence of such definitions does not suggest that highly interactive relationships between families of choice and families of origin do not exist. Kinship networks often teach the social and cultural lessons that influence choices of central family members and forms, and in turn, the family of origin often shapes expectations of what kinship, partnership, parenthood, and other family connections should and will be.

The failure to acknowledge these differing intentions adds to the confusion around conflicting conceptions of family. For example, the Pro-Family Coalition definition seems to focus on kinship. Within its guidelines, family members include not only those in the nuclear family, but also grandparents, aunts, uncles, sisters-in-law, and so on, implying a whole extended network of relations. Moreover, the Pro-Family Coalition formulation makes no distinction among these relationships; thus, all ties based on blood, marriage, or adoption appear to be equally significant throughout a person’s lifespan. Conversely, the AHEA formula completely discounts the significance of kinship ties; according to this definition and ones like it, independent adult children might no longer be considered family members of the persons who raised them.

Clearly, any of these approaches on its own omits family ties which many people consider significant. This is probably not completely intentional. Perhaps the Pro-Family Coalition meant only to define the limits of kinship, with the expectation that such kin generally live together in nuclear units. It is equally possible that AHEA intended its formulation to emphasize what it considered to be the primary importance of individuals’ families of choice, with the understanding that kinship ties would not dissolve altogether, but

14. The terms “family of origin” and “family of procreation” were first introduced by Murray Bowen in *FAMILY THERAPY IN CLINICAL PRACTICE* (1978). I use the term “family of choice” rather than “family of procreation” in order to acknowledge that many contemporary adult partnerships are formed for purposes other than procreation. However, I recognize that not all family arrangements are freely chosen; in many cultures worldwide there exists a long history of arranged marriages. For one example of a cross-cultural comparison of arranged marriage, see R. BLOOD, JR., *LOVE MATCH AND ARRANGED MARRIAGE: A TOKYO-DETROIT COMPARISON* (1967). Moreover, before recent changes in medical technology and societal norms, the “choice” to beget children was almost never voluntary within these partnerships; even now subtle and not-so-subtle social pressures encourage women to have children in order to fulfill their presumed roles in society. See A. RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* (1976).

rather take on less significance. Nevertheless, neither definition can embrace completely the broad range of our cultural conceptions regarding what constitutes a family.

This Note, while acknowledging the importance many of us continue to attach to both social formations,¹⁵ will attempt to untangle and illuminate the differences between the idea of kin and contemporary conceptualizations of "family," that is, the nuclear family and its alternatives. An examination of the morass created by the conflation of these two concepts serves to bring into even sharper focus the fact that what constitutes "the family" has become a hotly contested political issue, with the primary battleground being the family of choice. Since this "central"¹⁶ family is the unit over which most debate occurs, this Note will most closely examine those ties.¹⁷ The comparatively voluntary nature of the formation of central families, as well as their primacy as a culturally sanctioned unit, makes the family of choice the major site of (potential) experimentation and redefinition of "the family."

Our cultural ideology assumes that everyone should live in some form of nuclear family, and that the nuclear family is ideally suited to modern American society. Although this form of family has a long history, its primacy as an ideological construct is relatively recent. However, the nuclear family as a cultural ideal does not accurately reflect the reality of many families today, if it ever did.¹⁸ This disjunction between ideology and reality has fostered political challenges to the desirability of the nuclear family.

When the law has dealt with the family, it has often shown deference to conventional family ties. As the nuclear family gained preeminence, the law incorporated it as the basic cultural norm. This integration has increasingly come under fire as critiques of the nuclear family have developed. Moreover, the institutionalization of the nuclear family has had a damaging effect upon members of families whose relationships do not conform to this model, and thus go unrecognized by the law.

Therefore this Note explores the possibility of incorporating truly alternative and pluralistic family definitions into the law. Rather than searching

15. Kinship itself can be an extremely complex concept. It incorporates a number of assumptions meriting explanation. For example, for many individuals, networks of friendship may be as vital and supportive as kin networks. As much work must be done to demystify kinship as to demystify the family of choice, although such an endeavor exceeds the limits of this Note.

16. I use the term "central" here and elsewhere when I use "family of choice" to distinguish it from the nuclear family model. The term "nuclear family" will be used to refer more to the ideology of a particular type of central family: married partners of opposite sexes and their children. In many cases, central families may greatly resemble the ideal of the nuclear family, or be directly analogous to the model — such is the case in families consisting of unmarried heterosexual adult partners or same sex couples. In other situations, however, central families may be composed quite differently.

17. That is, while the importance of extended or tenuous family ties is a disputed point, how such bonds should be described has not received much attention in the ongoing controversy over the definition of family.

18. See *infra* text accompanying notes 68-103.

for potential statutory changes, we must start by asking how we could re-invent a means of including multiple non-traditional family definitions in law if we were not constrained by current social and political reality, and if we were not limited by traditional conceptions of both the law and the family. This Note seeks to move in the direction of individually- or family-initiated definition of relationships, and away from formulations of family imposed by the state.

Part I examines the ways in which the ideology of the nuclear family gained preeminence. It also investigates the challenges to the primacy of the nuclear family by political and social movements for change. Part II discusses the effect that this unitary definition has on current family law and the relation of other family forms to the legal model. It evaluates the judicial expansion of legal definitions of family in case law, as well as proposed changes in current schemes offered by legal scholars. Finally, Part III explores possible means of introducing a much-needed sense of plurality of family forms within the law and discusses the ramifications of such a proposal. I do not wish to establish a single concrete plan in this area. To do so at this stage might serve to limit dialogue regarding potential approaches to incorporating recognition of a diversity of family forms. Instead, my purpose is to expand and encourage a discourse that can establish our ultimate societal goals, from which we can then begin to envision concrete solutions.

I.

THE NUCLEAR FAMILY AND ITS CRITICS

The "traditional" nuclear family as a sociological construct was a well-studied institution in early modern sociology. The work of Bronislaw Malinowski and Talcott Parsons, among others, established a body of theory regarding the nuclear family and its evolution. In recent years, these understandings of the nuclear family have come under attack by feminists and other thinkers. Both in theoretical writings and in the law, a recognition of pluralistic and alternative forms of family has begun to develop.

A. *The Primacy of the Nuclear Family*

How did the traditional nuclear family achieve such prominence? Answers to this question can be found both in the increasing influence of sociological explanations of the family beginning in the late nineteenth century and in the changes in family systems over the past one hundred years. Much of the development of family theory originated in the growth of sociology as an academic discipline in the late nineteenth and early twentieth centuries.¹⁹

19. See, e.g., Collier, Rosaldo & Yanagisako, *Is There a Family?* *New Anthropological Views*, in *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* 25, 29-33 (1982); see also Linton, *The Natural History of the Family*, in *THE FAMILY: ITS FUNCTION AND DESTINY* 18 (1949). For the sake of clarity, the schematized history of family theory which follows elides the complex interactions among theoretical movements. While this discussion comprises a lin-

Many germinal social theorists relied heavily on the work of anthropologist Bronislaw Malinowski, who regarded the family as "the foundation of human society."²⁰ Malinowski relied on the "principle of legitimacy" to support his contention that the nuclear family was essentially universal for "healthy" societies.²¹ He argued that since human children require a long period of caretaking from adults, each child needs an identifiable mother and father to claim as nurturers.²² In order to serve this goal, women and men became aligned in permanent pairs so they could determine the paternity of offspring; in this way, the community could identify which adults were responsible for the care of particular children. These groups then formed affectional ties and became, inevitably, families.²³ Malinowski presumed that societies in which the nuclear family was not the norm were either insufficiently developed or in the process of decay.²⁴

Not all early social thinkers agreed that the nuclear family was the most socially desirable form. Socialist theorists such as Karl Marx and Frederick Engels challenged the naturalized "bourgeois" nuclear family. Marx and Engels postulated that family forms grew out of changing historical realities. Specifically, they argued that changes in the distribution of property within social systems led to the establishment of certain family models.²⁵ Moreover, according to Marx and Engels, the nuclear family was designed not to fulfill emotional or material needs but to satisfy the requirements of capitalist production: it would protect private property by enforcing monogamy, which would ensure that the paternity of children could be established, and thus would allow property to be transferred intergenerationally. Engels later refined and expanded upon this theory, tracing the emergence of four distinct family forms over the course of millennia and maintaining that each developed out of the last according to shifting patterns of property relations.²⁶ Unlike

ear narrative of trends in sociological thought, other elements, such as prevailing historical, moral, and social forces, as well as prior and concurrent social theories, greatly influenced each theorist's work.

20. Keller, *Does the Family Have a Future?*, in *FAMILY IN TRANSITION: RETHINKING MARRIAGE, SEXUALITY, CHILD REARING, AND FAMILY ORGANIZATION* 520 (A. Skolnick & J. Skolnick 5th ed. 1986) [hereinafter *FAMILY IN TRANSITION*] (quoting a debate between Malinowski and Robert Briffault broadcast by the B.B.C.).

21. See Malinowski, *Parenthood, the Basis of the Social Order*, in *THE NEW GENERATION: THE INTIMATE PROBLEMS OF MODERN PARENTS AND CHILDREN* 113 (1930).

22. B. MALINOWSKI, *A SCIENTIFIC THEORY OF CULTURE* 91-119 (1944).

23. Skolnick & Skolnick, *Introduction: Family in Transition*, in *FAMILY IN TRANSITION*, *supra* note 20, at 8-9.

24. *Id.* at 8.

25. Marx & Engels, *Manifesto of the Communist Party*, in *THE MARX-ENGELS READER* 473, 473-76 (R. Tucker ed. 1978) (English ed. 1888).

26. F. ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 44-88 (1884 rpt. Pathfinder Press 1988). Engels uses the term "consanguine" to describe families in which sexual partnerships are arranged non-exclusively along generational lines: all mothers and fathers within a family are equal spouses to each other and are parents to all children within the family. All children are siblings and also spouses to each other. In the punaluan family, inter-"sibling" partnerships are prohibited. Moreover, only the children of a mother's sisters

Malinowski, Engels viewed the monogamous nuclear family as having evolved over time, and conceived of it as a socially constructed rather than a naturally occurring phenomenon, mutable in accord with alterations in the surrounding society.²⁷

Engels' argument that the nuclear family was a relatively recent historical development set the stage for later sociological work, which came to view the nuclear family as arising contemporaneously with the industrial revolution. Like Engels, later sociologists noted that the composition of the central family unit changed over time, though they did not necessarily view such changes as determined by systems of property relations. Unlike Engels, however, many early twentieth-century social theorists still considered the nuclear family a universally desirable form and feared for its survival in the face of progress toward a technologically advanced society.²⁸

Generally, these theorists offered the nuclear family as the social norm for modern Western cultures and traced the development of this structure from its roots in the previously dominant extended family. According to this construction, economic survival within the agrarian cultures most common to Western societies prior to the nineteenth century depended upon an institutionalized extended family network.²⁹ This theory rests on the premise that only a moderately-sized intergenerational group in which members bonded to one another by interdependence and kin loyalty could carry out all of the tasks necessary for self-sufficiency in a subsistence economy. In such a society, most necessary work took place in the household.³⁰ Children were needed help-mates, rather than social and financial burdens. The larger family group was somewhat self-contained, providing education, spiritual development, and emotional expression in addition to corporal maintenance.³¹

Some theorists argued that the industrial revolution, with its associated advancement in technology and trend toward urbanized individual factory labor, resulted in a transition from extended families to the nuclear family as the

and of a father's brothers are those parents' "children:" cross-gendered siblings' children are simply nephews and nieces and available spouses for their cousins. The pairing family establishes serial monogamy among sexual partners, and a widening circle of relatives is excluded from such partnerships. Children "belong" solely to their mother and thus are only siblings with their mother's other children. Finally, the monogamian family establishes (at least for the female partner) a sexually exclusive, insoluble sexual partnership between two individuals, whose only children are those which come out of their union. Intra-family sexual relations are forbidden either across or between generations.

27. Note that while these formulations of family could embrace myriad relationships, Marx and Engels saw heterosexuality and procreation as essential to the central family and as "naturally" occurring within the sanctioned family.

28. Skolnick & Skolnick, *supra* note 23, at 13.

29. See, e.g., J. SHAFFER, *FAMILY AND FARM: AGRARIAN CHANGE AND HOUSEHOLD ORGANIZATION IN THE LOIRE VALLEY, 1500-1900*, at 4-12 (1982) (system of land-tenure necessitates the joint family system).

30. Hareven, *American Families in Transition: Historical Perspectives on Change*, in *FAMILY IN TRANSITION*, *supra* note 20, at 44.

31. *Id.* at 44-45.

norm.³² The advent of industrialization promoted the exchange of labor for wages and reduced the need for each unit to be self-supporting. Such individualized work did not require large family units.³³ Therefore, according to this theory, the nuclear family resulted at least in part from this breakdown of the more attenuated family ties. These observers feared the eventual disintegration of the nuclear family as continued economic progress undermined the importance of kinship.³⁴

However, the advent of the "functionalist" school of family theory in the 1940s brought about a massive surge of optimism regarding the nuclear family. The functionalist school assumed that systems of human relations existed in a society because over time they had adapted to the society's needs.³⁵ Thus an explanation of how a social institution worked also constituted a justification for its superiority. An important component of this idea was the supposition that in any given historical period, the dominant family system was uniquely adapted to other social forces; each system gave way to the next variation only if it better suited the emerging social conditions.³⁶ This depiction of the evolution of family structure primarily found support in the work of nineteenth-century researchers whose theories emanated from Social Darwinism.³⁷ These writers present the nuclear family as the natural victor over competing forces during the change to a technological society. The idea of family structures battling for survival solidified the sense that "the family," in whatever form it existed, was an effective, systematized phenomenon.³⁸

The most influential proponent of the functional theory of the modern family was Talcott Parsons. Parsons based his views regarding the inevitability of the contemporary nuclear family on the gender-specific differentiated roles assigned to each member.³⁹ Parsons agreed with his contemporaries that the nuclear family evolved from loose extended-family households concurrently with the rise of industry. He refined this theory, however, by describing

32. M. GORDON, *THE NUCLEAR FAMILY IN CRISIS: THE SEARCH FOR AN ALTERNATIVE 2* (1972) (explaining and critiquing this construction).

33. Hareven, *supra* note 30, at 44-46.

34. Collier, Rosaldo & Yanagisako, *supra* note 19, at 30 (noting "these writers . . . shared a sense of moral emptiness and a fear of instability and loss"); see also Hareven, *supra* note 30, at 40; Skolnick & Skolnick, *supra* note 23, at 13.

35. F. ELLIOT, *supra* note 8, at 9.

36. Some theorists have also posited that the purposes such family structures served for their members differ among temporal periods. See the discussion of the work of E. Burgess, H. Locke, and M. Thomes in *id.* at 38.

37. Collier, Rosaldo & Yanagisako, *supra* note 19, at 30 (describing the social philosophy of Herbert Spencer).

38. See, e.g., Murdock, *The Universality of the Nuclear Family*, in *A MODERN INTRODUCTION TO THE FAMILY* 44 (1968) (presenting the nuclear family as effective because, for example, although "agencies" may share in the fulfillment of the functions of the family, they have never supplanted it).

39. See generally T. PARSONS & R. BALES, *FAMILY, SOCIALIZATION AND INTERACTION PROCESS* (1955).

a shift over time in the purpose of the family.⁴⁰ He noted that family networks historically depended upon each member's labor for survival. Mutual reliance of family members for both emotional and physical support placed intragroup cooperation and loyalty at a premium. Parsons contended that the shift from self-sustaining kinship groups caused by the post-industrial separation of work and home required those in the modern labor force to enter a work world governed by merit and competition. Instead of completely enclosing family members, the home took on different functions: to rear children and prepare them to enter the harsh exterior world and to nurture those adults already engaged in the industrial work force. As the family's primary function became the emotional support of its members, the size of the unit shrunk. Simultaneously, other kinship ties became less important and more attenuated.⁴¹

Parsons further explained that men and women in modern families adopted differentiated roles in order to complete this transformation of the family into a specialized unit.⁴² Parsons argued that the "task-oriented small group" was directly analogous to a nuclear family, and speculated that the adult partners took on certain roles in order to meet these same needs. Hence the wife assumed the "expressive"⁴³ role⁴⁴ while the husband assumed the instrumental role. Parsons maintained that this split was part of a general trend toward a more differentiated society and contended that the differentiation of roles played a functional purpose by increasing efficiency. According to this theory, the nuclear family was a complete and integrated system, with each member dependent upon the others for the maintenance of the family and each contributing essential elements to the system.

Parsons' theories represented a watershed in the growing field of family study. Parsons successfully integrated into a single theory the various strands of previous sociological work on the family. Although shaped by historical conditions, the family, according to Parsons' theory, would not disappear with

40. Parsons, *The American Family: Its Relations to Personality and to the Social Structure*, in *id.* at 3-9.

41. See generally *id.* at 3-33.

42. Parsons based his theories on the work of experimenters who showed that in small, task-oriented groups (composed of male Harvard students) a process of differentiation occurs such that two separate leadership roles emerge to serve the needs of the group as well as the needs of the task. One person in the group tends to become a "task" leader, and another person to become a "social/emotional" leader. Bales & Slater, *Role Differentiation in Small Decision-Making Groups*, in T. PARSONS & R. BALES, *supra* note 39, at 259. The instrumental leader focuses on making sure the task gets done while the social/emotional leader focuses on ensuring that the emotional needs of the group members are met. *Id.* at 297-99; see also F. ELLIOT, *supra* note 8, at 34-39; Zelditch, *Role Differentiation in the Nuclear Family: A Comparative Study*, in *id.* at 307-51.

43. Parsons chose to use the term "expressive" rather than Bales and Slater's term "social/emotional," though each referred to the same set of characteristics.

44. Parsons offered no explanation for his assumption that seeing to the emotional needs of the family was a "female" task, nor for his assumption that wage-earning was a "male" job. He seemed simply to have assumed that this was a "natural" division based on the differences between the genders, most notably the women's childbearing function. See Parsons, *supra* note 40, at 23.

the demise of agricultural society. Rather the family would adapt to modern conditions and remain as the efficient basis of modern industrial society. The modern nuclear family, in particular, can, according to Parsons, be seen as an inevitable result of factors unique to the earlier part of this century.⁴⁵

B. *Criticisms of Traditional Theory*

When first published, Parsons' work on the family was almost universally acclaimed for its coherent and carefully outlined theory. Indeed, Parsons remains a commanding figure in the sociology of the contemporary Western family; his work is currently regarded as the fundamental articulation of modern conservative family theory.⁴⁶ However, many of his constructs have been disputed, and few contemporary sociologists subscribe to his theories in their entirety.⁴⁷

Parsons' theories have provoked an array of criticisms, which fall into three loose categories. The first of these criticisms notes that Parsons' characterization of the development of family forms reflects an idealized vision of simultaneous technological and societal "progress" which is not historically accurate. Given the variety of potential family systems, the cultural choice of one form as dominant is not historically inevitable but socially dictated. Second, progressive and feminist critics argue that the family is not a value-neutral product of human relations, whose sole function is to fulfill social needs, but "an ideological construct with moral implications."⁴⁸ Third, recent social movements and historical developments have led to radically changed understandings of the structure and role of family in society. Contemporary family theorists, building upon feminist demystification of the ideological nature of "the family," point out the dissonance between the normalization of the nuclear family and the lived experiences of "family" for a large number of Americans. Closer examination of these three challenges to Parsons reveals their power not only as academic arguments but also as vehicles toward a more sophisticated understanding of current realities of family life.

The normative critique of Parsons' theory focuses on his insistence that a single kind of industrialized social development led to a single kind of nuclear family in all healthy "advanced" societies, and the related generalization that nuclear families arose only as a result of industrialization. Both of these assertions have proven inaccurate. The first influential proponent of this criticism, Peter Laslett, offers evidence that in the agrarian social structure of sixteenth- and seventeenth-century England, only about ten percent of households contained family members outside of nuclear family relationships.⁴⁹ This finding

45. Parsons, *The Normal American Family*, in FARBER, MUSTACCHI & WILSON, *MAN AND CIVILIZATION: THE FAMILY'S SEARCH FOR SURVIVAL* 31 (1965).

46. See F. ELLIOT, *supra* note 8, at 34.

47. *Id.* at 35.

48. Collier, Rosaldo & Yanagisako, *supra* note 19, at 37.

49. Laslett, *Mean Household Size in England Since the Sixteenth Century*, in *HOUSEHOLD AND FAMILY IN PAST TIME: COMPARATIVE STUDIES* 125 (1972).

casts doubt on Parsons' description of the unique suitability of the nuclear family to industrialized society. Moreover, cross-cultural research demonstrates that significant variations exist in family patterns among modern industrialized societies. Historical studies in both Western and Asian societies reveal strong ties between specific societies' values and construction of family in their historical past and the equivalent values and structures in the present.⁵⁰ In fact, many scholars now argue that it is impossible to identify one specific family form common to all industrialized societies. Rather, they contend that each culture develops its own kind of family based in part upon its own past, traditions, and values.⁵¹ Moreover, within any given culture a variety of family forms can exist simultaneously. Of course, social upheavals such as industrialization altered and reshaped the family, but the nature of these changes was conditioned by the particulars of extant cultural values.⁵²

While this first set of critics questions Parsons' belief in the inevitability of the nuclear family, few challenged the implicit value systems upon which the nuclear family itself is based. With the rise of the second wave of feminism in the late 1960s, however, came an explicit critique of the Western nuclear family,⁵³ as well as of Parsons' explication of its roots and functions. For the most part, current feminism not only has refuted Parsons' theory of the origin of the nuclear family, it has also challenged the nomination of heterosexual marriage and childrearing as an ideal, or even workable, social system.

Of course, feminist thought is not uniform. Indeed, there are striking divergences within feminist theory, including a wide sweep of political and social affinities which range from radical to relatively liberal to self-consciously conservative work, and include theories based on the unique experiences of women of color, the perspective of lesbian separatism, and the premises of Marxism, socialism, and other social visions.⁵⁴ While not all femi-

50. For example, the somewhat loose kinship priorities of modern White Anglo-Saxon American Protestants can be traced back to kinship values among Puritans in the seventeenth-century American colonies. M. GORDON, *supra* note 32, at 3-6. Similarly, some theorists have argued that the tendency of the modern Japanese family toward collectivist values and strong extended kinship bonds has its origins in feudal Japanese society. See F. ELLIOT, *supra* note 8, at 39.

51. See, e.g., W. GOODE, *WORLD REVOLUTION AND FAMILY PATTERNS* (1963).

52. See A. MACFARLANE, *THE ORIGINS OF ENGLISH INDIVIDUALISM: THE FAMILY, PROPERTY AND SOCIAL TRANSITION* (1979).

53. Note that the American feminist critique of the family did not begin in the 1960s, but rather emerged from women's activism beginning in the late nineteenth century. See *generally* THE FEMINIST PAPERS: FROM ADAMS TO DE BEAUVOIR (1973). Much of the "woman's movement" of the post-Civil War era focused on the inequalities inherent in marriage and the heterosexual family. C. GILMAN, *WOMEN AND ECONOMICS: A STUDY OF THE ECONOMIC RELATION BETWEEN MEN AND WOMEN AS A FACTOR IN SOCIAL EVOLUTION* (1898); see also Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 *LAW & HIST. REV.* 25 (1990). However, the nineteenth-century feminist movement was primarily organized around achieving women's suffrage, not restructuring gender relations. Thus, when suffrage was granted, a political anticlimax caused feminism to decline. M. RYAN, *WOMANHOOD IN AMERICA: FROM COLONIAL TIMES TO PRESENT* 217-20 (1983).

54. Many radical feminists hold that male dominance is the primary source of all social

nists have agreed on the current system's origins or on ideal alternatives,⁵⁵ most are dissatisfied with the present family system as well as with the way in which the social sciences compress a variety of family structures into one model. Fundamental to the feminist movement are the beliefs that the compulsory nature of the nuclear family and the traditional roles which are assumed to operate within it oppress and limit both women and men, and that we may reshape "the family" in ways which reflect feminist values and human realities.

Barrie Thorne, a leading feminist theorist, identifies five major themes within the feminist rethinking of the sociology of the family to support her contention that "feminists have challenged beliefs that any specific family arrangement is natural, biological or 'functional' in a timeless way."⁵⁶ Thorne's summary provides a concise reading of the interwoven threads of feminist discourse(s) around family theory:⁵⁷

1. Feminists . . . have argued against the ideology of "the monolithic family," which elevates the contemporary nuclear family with a breadwinner husband and full-time wife and mother as the only natural and legitimate family form . . .⁵⁸
2. Feminists have sought to reclaim the family — including

inequality, and that society, as well as the family, has to be completely restructured to achieve parity. Liberal feminists tend to locate women's oppression in laws and other social constructs such as educational and vocational barriers, presumed family obligations, and learned patterns of behavior in both women and men which serve to reinforce traditional notions, all of which act to prevent women from achieving parity with men. Such liberal thinkers maintain that when legal and societal barriers to women's equality are removed, gender parity will assume its rightful position as the social norm. For a thorough discussion of different forms of feminist thought, see A. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1983); A. JAGGAR & P. ROTHENBERG, *FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN* (2d ed. 1984) [hereinafter *FEMINIST FRAMEWORKS*].

55. For example, Shulamith Firestone roots male dominance in biology: "[t]he heart of a woman's oppression is her childbearing and childrearing roles." S. FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR A FEMINIST REVOLUTION* 81 (1970). These roles have forced women to accept permanently reduced mobility and ties to home and children. The only path toward liberation, Firestone maintains, is for women to reject biologically-assigned roles, and male dominance, and to form women-only communities. On the other hand, liberal feminists such as Caroline Bird locate the beginnings of patriarchy in the distribution of power within political systems: once power is fairly distributed, inequality between men and women will disappear. C. BIRD & S. BRILLER, *BORN FEMALE: THE HIGH COST OF KEEPING WOMEN DOWN* 186-87 (1968).

56. Thorne, *Feminist Rethinking of the Family: An Overview*, in *RETHINKING THE FAMILY*, *supra* note 19, at 2.

57. The following quotation in text, from Thorne, *supra* note 56, at 2-3, is embellished with my own references to relevant literature.

58. See K. MILLETT, *SEXUAL POLITICS* 45-49 (1969). Millett sees the family as "Patriarchy's chief institution," *id.* at 45, and its reproductions of gender-specific roles as vehicles for the perpetuation of male dominance. Susan Johnson's study of long-term lesbian couples explicitly suggests that alternative family systems can act as "positive role models" to present more "humane and livable" forms of family structures. S. JOHNSON, *STAYING POWER: LONG TERM LESBIAN COUPLES* 16 (1990).

topics such as the sexual division of labor,⁵⁹ heterosexuality,⁶⁰ male dominance,⁶¹ and motherhood⁶² — for social and historical analysis

. . . .

3. . . . Feminists have explored the differentiation of family experience mystified by the glorification of motherhood,⁶³ love, and images of the family as a domestic haven⁶⁴

4. Feminists have raised questions about family boundaries This line of analysis challenges a series of dichotomies — private and public, family and society — that are often taken for granted.⁶⁵

5. . . . [Feminists have explored] the degree to which the division between market-based individualism and family-based nurturance is ideological or factual, and its consequences and possible solutions.

59. Among the first examples of this in the United States is Betty Friedan's *The Feminine Mystique*. Friedan argued that middle-class American women living in the post-World War II era accepted that their only true calling and fulfillment lay in their potential roles as wives and mothers; such women felt (and to a great extent were) banned from the world of work outside the home. B. FRIEDAN, *THE FEMININE MYSTIQUE* 41 (1963).

60. See Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 177 (1983); see also J. BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* (1980). Both works examine the predominance and presumption of heterosexuality in Western culture and critique theoretical inabilities to address the special situation of lesbians and gay men.

61. See A. DWORKIN, *WOMAN HATING* (1974). Dworkin holds that "[t]he commitment to ending male dominance as the fundamental psychological, political and cultural reality of earth-lived life is the fundamental revolutionary commitment. It is a commitment to transformation of the self and transformation of the social reality on every level." *Id.* at 17.

62. See N. CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978) (challenging the Freudian notion that "anatomy is destiny" and instead postulating that female motherhood is a socially/psychically self-perpetuating structure which can be altered).

63. See Shulman, *A Marriage Agreement*, 1 *UP FROM UNDER 5* (Fall 1970), in which Shulman questions the "glory" of motherhood in the context of the work involved in parenting. She notes: "Children make unbelievable messes But even more burdensome than the physical work of childrearing was the relentless responsibility I had for the children As the children grew up, our domestic arrangement seemed increasingly odious to me." *Id.* at 5-6.

64. One basis for this criticism is the argument that "family life" is the locus of women's labor, not women's leisure. Since housework is inequitably divided between women and men, "coming home" does not provide women with a sense of relaxation, but simply with a resumption of household duties. Women's work has continued to grow in recent times, in which a larger percentage of women work both inside and outside the home. Berheide found that women did between 72% and 94% of household tasks; Berk and Berk conjecture that "employed wives hold down two full-time jobs" by working for wages and performing housework. Berheide, *Women's Work in the Home: Seems Like Old Times*, in *WOMEN AND THE FAMILY: TWO DECADES OF CHANGE* 37 (1984); R. BERK & S. BERK, *LABOR AND LEISURE AT HOME* 231 (1979).

65. These issues relate closely to the theories stated above: the definitions of public and private spheres are played out in arenas such as housework, heterosexual marriage, and motherhood.

Thorne's synopsis represents almost twenty years of feminist thought about the family and relations between the sexes. However, these analyses did not emerge, fully formed, from the minds of feminist theorists over the course of the 1960s, 1970s, and 1980s. Instead, the imposition of this kind of scrutiny on human and gender relations emanated from the interactions between developing feminist theories and other social movements that challenged and solidified feminist ideology and practice. All of these were part of a massive shift in public political discourse, from an ideology of sameness and conformity to a politics of difference and change.⁶⁶ Thus, the increasingly popular acceptance of basic feminist ideas led many middle class (and previously apolitical) women to feel trapped within the nuclear family.⁶⁷

Concurrent with the rise of feminism, society's attitudes toward sex, marriage, divorce, homosexuality, and collectivism changed. These transformations affected understandings of the family with respect to structure as well as function. In terms of reconfigurations in family structure, the most significant of the social change movements intersecting with feminism was the so-called "sexual revolution" of the late 1960s to mid 1970s. This phenomenon (or combination of phenomena) radically altered cultural perceptions of sexuality from a totally "private" domain to a topic of increasing public preoccupation. One formative element of this "revolution," the introduction of the birth control pill in 1960 and its subsequent popularity, allowed women a semblance of freedom from unwanted pregnancy.⁶⁸ This new technology gave women the option of supposedly worry-free sex; the changes in sexual mores also made it (theoretically) guilt-free and plentiful.

This principle of sex without anxiety for both women and men was the cornerstone of the growing sexual freedom of the 1960s, culminating in the "free love" and "sexual anarchy" movements of the hippies.⁶⁹ Feminism also initially espoused "sexual liberation,"⁷⁰ seeing in it a release from the double standard of female passivity and male aggression that had previously marked

66. For example, during the 1960s women were deeply involved in public political movements for social change, particularly the civil rights, New Left, and antiwar movements. M. RYAN, *supra* note 53, at 310-11. Despite (or perhaps because of) their participation, many women within these movements realized that they were denied the equality that they demanded for others, often by their (male) fellow activists. J. D'EMILIO & E. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 310-11 (1988). Thus, they took the political tools they had learned and applied them to their own oppression as women. See L. SARGENT, *WOMEN AND REVOLUTION* (1981); see also M. RYAN, *supra* note 53, at 310-12 (tracing the growth of one wing of the feminist movement as a protest against misogyny within the civil rights movement and the New Left).

67. See Friedan, *Twenty Years After and Introduction to the Tenth Anniversary Edition*, in B. FRIEDAN, *THE FEMININE MYSTIQUE: TWENTIETH ANNIVERSARY EDITION*, 5 (1983).

68. See J. D'EMILIO & E. FREEDMAN, *supra* note 66, at 309.

69. *Id.* at 307.

70. Over time, however, it became increasingly clear that the sexual revolution was by no means as revolutionary as it claimed. Feminists charged that "sexual freedom in contemporary America had become 'the right that is a duty.'" *Id.* at 312. The desire to escape from repression became a new pressure to have sex all the time.

heterosexual interactions. This kind of sexual experimentation was not limited to those who saw themselves on the margins of, or rebelling against, society. The gradual disjunction between sex and marriage affected every level of society: marriage was no longer either inevitable or necessarily permanent, since sex was more freely available both before and outside of the matrimonial bond.

Not only were sex and marriage gradually becoming disentangled; the same was increasingly true of sex and heterosexuality. Inspired in part by the feminist critiques of heterosexual marriage and emboldened by movements for sexual freedom, lesbians and gay men began to join together socially and politically to form the new gay rights movement.⁷¹ The increasingly high profile of organizations such as the Gay Liberation Front, Radicalesbians, and the Gay Activists Alliance, as well as the gradual "normalization" of discussions of homosexuality, led many people to rethink their sexual orientation.⁷² Moreover, some individuals who had entered into straight marriages to hide or "cure" their homosexuality were motivated to sever their heterosexual relationships and enter the growing lesbian and gay community.⁷³

As a partial result of these social upheavals, the 1970s brought about a tremendous increase in the divorce rate. Researchers claim that during the 1970s and 1980s almost half of all marriages in the United States ended with divorce,⁷⁴ compared to a significantly lower rate two decades before.⁷⁵ That increase has heralded a number of changes both in attitudes toward family roles and actual family structures.

Primarily, the growing divorce rate has had several predictable, concrete results. First, the rising rate of divorce has led to a proportionate increase in newly-single people;⁷⁶ whereas unmarried adults had previously been a small minority, suddenly large numbers of persons who had expected to be bonded "until death do us part" found themselves separated much sooner.⁷⁷ Further

71. *Id.* at 320-21.

72. See generally B. ADAM, *THE RISE OF A GAY AND LESBIAN MOVEMENT* 75-101 (1987); L. HUMPHREYS, *OUT OF THE CLOSETS: THE SOCIOLOGY OF HOMOSEXUAL LIBERATION* 1-12 (1972) (describing the rise of the gay rights movement).

73. See, e.g., Baetz, *I See My First Lesbian*, in *THE LESBIAN PATH* 3 (M. Cruikshank ed. 1985) (personal narrative).

74. Martin, *Two Cheers for the Moral Majority*, in *FAMILY RELATIONS* 470 (1988). Not all studies agree with these figures, but in general researchers agree that the rise in divorce rates over the past twenty years has been enormous. See W. BEER, *RELATIVE STRANGERS: STUDIES OF STEPFAMILY PROCESSES* ix (1988); F. ELLIOT, *supra* note 8, at 149.

75. In 1965, the divorce rate was 2.5 per 100 population. National Center for Health Statistics, *Birth, Marriages, Divorces and Deaths for 1979*, 28 MONTHLY VITAL STATISTICS REPORT 12 (1980).

76. Such a transition often requires tremendous readjustment. Single adults have many of the same responsibilities and concerns as married people, but deal with these issues quite differently. Stein, *The Diverse World of Single Adults*, in *MARRIAGE AND FAMILY IN A CHANGING SOCIETY* 63 (1989) [hereinafter *MARRIAGE AND FAMILY*].

77. Additionally, the growing acceptance of single status may have led more and more adults to delay or even forgo marriage. Since 1970, the proportion of women and men who

complications existed for individuals with children, who were not only single but also single parents.⁷⁸ Thus divorce, followed by remarriage, often has created blended families that include children from prior unions. While remarriage after the death of a spouse had occasionally created blended families in the past, the increased number of individuals with children seeking remarriage after a divorce has greatly normalized this previously unusual family structure. New families of husbands, wives, ex-husbands, ex-wives, step-children, half-siblings, and other variations on this theme have exploded the previously uniform membership of the nuclear family.⁷⁹

With these basic changes in demographics came a deeper transformation in cultural beliefs about marriage and the previously hegemonic roles marriage required. Many newly divorced women, often not having previously worked outside the home, have had to learn to support themselves financially. This has been especially true for women who were awarded custody of their children. Although ex-husbands generally have been required to pay alimony and child support for children under the age of eighteen living with their mothers, the break-up of a marriage still frequently results in a drastic reduction of the woman's standard of living.⁸⁰ The increase in the number of female-headed single parent families, in combination with increasing awareness of feminist ideology, has led to a change in attitude regarding women's financial independence both within and outside marriage. Even those women who create "traditional" nuclear families, in which their household labor is exchanged for economic support by their husbands, cannot be certain that they will not in the future have to enter the marketplace for employment. Women have had to learn to conceive of themselves as economically viable. Today, more women retain jobs after they marry, in part to bring money into the home and to guarantee financial stability in the case of divorce, but also in significant part to achieve the sense of fulfillment and independence long associated with career ambitions.⁸¹ Thus men are no longer uniformly regarded as the sole breadwinners, a reality which subtly alters the balance of power within marriages.

These changes have led to the disruption of established family forms. As the divorce rate rose, many individuals rejected heterosexual paired marriage altogether, having lost faith in its supposed stability. In the aftermath of di-

have never married has almost doubled; currently, over 37% of all men and 43% of all women have never married. *Id.* at 63-64.

78. During the 1970s, the number of single parents grew by an astonishing 82%. *Only One U.S. Family in Four is "Traditional"*, N.Y. Times, Jan. 30, 1991, at A19, col. 1. By 1985, an estimated 12 million American children lived with a single parent. Martin, *supra* note 74, at 470.

79. W. BEER, *supra* note 74, at ix-x (noting that 75% of all divorced persons remarry, and 50% of those persons have children under the age of 18).

80. Weitzman, *The Divorce Revolution and the Feminization of Poverty*, in MARRIAGE AND FAMILY, *supra* note 76, at 468.

81. Sokoloff, *Motherwork and Working Mothers*, in FEMINIST FRAMEWORKS, *supra* note 54, at 262.

voce, many people chose to cohabit with new sexual partners without embarking on a new marriage. Beginning in the early 1970s, the number of young couples who chose to live together without marrying increased rapidly.⁸² Some researchers observed that many couples entered these living arrangements as a kind of "practice" marriage that facilitated acquiring skills needed to establish a household with a permanent partner in the future.⁸³ Other couples viewed their cohabitation as a specific attempt to rebel against the institutionalized, married nuclear family, while a smaller number saw the arrangement as a temporary convenience.⁸⁴ Overall, cohabitation has become firmly established as a viable family arrangement apart from heterosexual marriage.

A related form of alternative family is the "group marriage." Unlike dyadic marriages, a group marriage comprises three or more individuals and is characterized by an intention to form permanent, bonded, partnership-type relationships among all of the adults.⁸⁵ Group marriages have been patterned quite closely after existing marriage relationships; they emphasize sexual and interpersonal intimacy within the group⁸⁶ combined with collective living and child rearing.⁸⁷

The commune movement manifested the most radical split from the nuclear family model. Communal living, both urban and rural, rejected notions of private property, marriage, and parental privilege, while embracing principles of co-operative living and work.⁸⁸ These communes were formed by varying sized groups of individuals who were not necessarily related by blood, marriage, or adoption, but who intended to act as family members to one another⁸⁹ and as joint parents to children living in the community.⁹⁰ While vari-

82. Census data indicate that between 1970 and 1986, the number of unmarried couples cohabiting more than quadrupled, rising from 523,000 to well over 2,000,000. Jackson, *Living Together Unmarried*, in MARRIAGE AND FAMILY, *supra* note 76, at 73-74.

83. See Bloch, *Unwed Couples*, 132 REDBOOK 140-44 (1969); see also Macklin, *Non-marital Heterosexual Cohabitation: An Overview*, in CONTEMPORARY FAMILIES AND ALTERNATIVE LIFESTYLES: HANDBOOK ON RESEARCH AND THEORY 49 (1983).

84. Researchers saw these attitudinal divisions as predicated on gender. They noted that it was much more likely for men to view the arrangement in pragmatic terms while women see it as the beginning of a pattern moving toward increasingly stable and long-term relationships. Lyness, Lipetz & Davis, *Living Together: An Alternative to Marriage*, 34 J. MARRIAGE & FAMILY 305 (1972).

85. *Id.* at 143; see Constantine & Constantine, *The Group Marriage*, in THE NUCLEAR FAMILY IN CRISIS: THE SEARCH FOR AN ALTERNATIVE 204 (1972).

86. N. STINNETT & C. BIRDSONG, THE FAMILY AND ALTERNATIVE LIFESTYLES 147-49 (1978). The authors note that "[t]he majority of the men and women in group marriage indicate that they particularly enjoy sexual variety in the secure context of their group. They feel that their living arrangement provides a depth of emotional commitment and involvement that is not associated with most extramarital relationships." *Id.* at 147.

87. *Id.* at 149-61.

88. *Id.* at 101-36; see also Brudnell, *Radical Community: Contemporary Communes and Intentional Communities*, in CONTEMPORARY FAMILIES AND ALTERNATIVE LIFESTYLES: HANDBOOK ON RESEARCH AND THEORY 235 (1983); Kanter, *Communes*, 4 PSYCHOLOGY TODAY 53 (1970).

89. N. STINNETT & C. BIRDSONG, *supra* note 86, at 110, note that among commune mem-

ous communes had differing structures and rules (if any),⁹¹ as well as varying degrees of success,⁹² they all shared a common goal: to create a family system based on sharing rather than exclusivity⁹³ and organized around elected rather than biological family ties.⁹⁴

Of course, none of these family structures is, in itself, new.⁹⁵ Nor, in fact, are politically or socially idealized schemes for alternative families.⁹⁶ However, the energy provided by the social changes discussed above created a new self-consciousness about these experiments. Widespread discussion of a growing dissatisfaction with "the family" and an attendant variety of proposed and

bers "[t]he desire to belong to a larger family group has been expressed over and over. This generally is a reaction against the extremely individualistic, fragmentary type of family life that many people experience today." Kanter, *supra* note 88, at 53-57, observes that communes were formed in order to seek "family warmth and intimacy" and "to become extended families."

90. "For some communes becoming a family means collective childrearing, shared responsibility for raising children." Kanter, *supra* note 88, at 54.

91. N. STINNETT & C. BIRDSONG, *supra* note 86, at 104-08.

92. *Id.* at 131.

93. *Id.* at 109-10.

94. *Id.* at 135.

95. For example, communal arrangements have been attempted throughout history with various levels of success. One of the most successful long-standing contemporary example of communes is the Israeli *kibbutz*, which functions as a self-contained communal unit: individuals do form dyadic relationships, but all work, meals, childrearing, and recreation occur on a communal level. Moreover, marriage itself has no effect on either the standing or the responsibilities of *kibbutz* members. Spouses retain their own names, and children are raised in a communal children's house. Spiro, *Is the Family Universal? The Israeli Case*, in *THE NUCLEAR FAMILY IN CRISIS* 81 (M. Gordon ed. 1972). Group marriages have also been thought to exist sporadically throughout history and across cultures. N. STINNETT & C. BIRDSONG, *supra* note 86, at 140; *see also* F. ELLIOT, *supra* note 8, at 196. Cohabitation does not seem to have been attempted as a conscious alternative to marriage as frequently as communal families or group marriage. However, such influential thinkers as Bertrand Russell and Margaret Mead have formulated it as a desirable precursor to marriage in the form of a "trial marriage." B. RUSSELL, *MARRIAGE AND MORALS* (1957); Mead, *Marriage in Two Steps*, 127 *REDBOOK* 48 (1966). Cohabitation, some believe, strengthens the institution of marriage by allowing partners to live together and thereby to learn more about each other and about the dynamics of living as a couple. This conflation of cohabitation and marriage as a way to shore up the latter institution has also been written into law. The category of common-law marriage legally codifies cohabitation. For discussion of similarities and differences between cohabitation and common-law marriage, *see generally* Kandoian, *Cohabitation, Common Law Marriage and the Possibility of a Shared Moral Life*, 75 *GEO. L.J.* 1829 (1987). Generally, common-law marriage differs from cohabitation in that it confers all rights, privileges, and obligations accorded in law to married spouses upon individuals so bonded. Thus it is legally indistinguishable from marriage, except that cohabitation initiates it, rather than civil license.

96. Proposals for alternative communities date back to Plato's Republic in which Socrates outlines a complex aristocratic society. *See* PLATO: *THE COLLECTED DIALOGUES* 575-844 (E. Hamilton & H. Cairns eds. 1971). Thomas More designed a similar model in 1566. *See* T. MORE, *UTOPIA* (R. Robinson tr. 1970). Periodically, individuals have made more concrete attempts to implement utopian communities. One of the most well-known and successful was the Oneida Colony, founded in New York State in 1844 and lasting until around 1880. Among its many innovations in family structure, the colony included the concept of universal marriage, in which all members participated. This marriage was entirely separated from institutional support of childbirth and childrearing. Kephart, *Experimental Family Organization: An Historico-Cultural Report on the Oneida Community*, 25 *J. MARRIAGE & FAMILY LIVING* 261-71 (1963).

attempted alternatives have reached beyond individual proposals or isolated alternative communities, and no longer operate by assuming majority acceptance of the traditional nuclear family.

Feminist and other criticisms of the nuclear family paradigm interacted with changes in public opinion and public behavior to engender a final critique of Parsons' functionalist model: it does not reflect reality. More and more people are living in families that do not conform to the "traditional" model.⁹⁷ In addition, the contemporary proliferation of "alternative" families has exposed analysts not only to the changes occurring in primarily middle-class America but also to the variety of family structures across class and culture within the United States.

This growing awareness prompted anthropologists and other scholars to turn their attention to the family units of subcultures within the United States and their development. The most thoroughly examined family relations were those in working class and underclass black communities.⁹⁸ Researchers reported that, within these communities, bonded heterosexual couples raising their own children were the exception rather than the norm. They attributed this finding in part to the common absence of adult men in family structures. Unlike the practice in white communities, in which single mothers bore almost all of the responsibility for raising their children, in these black communities, a larger "kinship" group shared childrearing responsibilities.⁹⁹ Some, although not enough, research explores differing family relationships among Chicano,¹⁰⁰ Asian American,¹⁰¹ and other ethnic cultures, as well as among different social classes¹⁰² and sexual orientations.¹⁰³

Though some of this work is still in its infancy, the great diversity of critiques of the nuclear family, combined with changing social reality, and a simultaneous political movement encouraging women to challenge the

97. For example, according to the 1990 census, only 26% of the nation's households consist of two parents of the opposite sex living together with children. *Only One U.S. Family in Four is "Traditional," supra* note 78, at A19, col. 1.

98. Researchers had made such observations before, but generally with an eye toward condemnation of the "disorganized" black family. See, e.g., D. MOYNIHAN, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965); G. MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 930-35 (1945).

99. An example of this type of ethnography is C. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* (1975), which examines the exchange systems linking kin and non-kin in impoverished urban black families, with an eye toward examining the ways in which women, men, and children collectively adapt to poverty.

100. See Montiel, *The Social Science Myth of the Mexican American Family*, 3 *EL GRITO: J. CONTEMP. MEX. AM. THOUGHT* 56-63 (1970); see also Mirandé, *Chicano Families*, in *MARRIAGE AND FAMILY*, *supra* note 76, at 56-61.

101. See Sue & Kitano, *Asian American Stereotypes*, 29 *J. SOC. ISSUES* 83-98 (1973).

102. For a discussion of reliance upon extended kinship networks for the purpose of child-care among working-class families, see Rubin, *Worlds of Pain*, in *MARRIAGE AND FAMILY*, *supra* note 76, at 39.

103. See P. BLUMSTEIN & P. SCHWARTZ, *supra* note 5 (a comparative study of the impact of money, work, and sex on the lives of lesbian and gay couples, as well as married and unmarried heterosexual couples).

gendered roles within the family resulted in new ways of talking about families, and led to criticism of Parsons' theories. Thus we start now from a point in which this still-influential theory of family has been shown to lack a normative base, and to fail to reflect social reality.

C. *Toward a Recognition of Pluralistic Family Definitions*

The accumulating changes in the perceptions and realities of "the family" have initiated a rethinking of previously hegemonic family structures. This movement to reconceptualize family (or the threat of it) has engendered many seemingly contradictory definitions of the contemporary family. Indeed, the interaction among these formulations exemplifies the interrelated values woven into them. While it may seem that the AHEA definition¹⁰⁴ more accurately reflects modern notions of family than does the Pro-Family Coalition definition,¹⁰⁵ neither can be solely incorporated into law if the real goal is to include as many potential family forms (and therefore as many potential family definitions) as possible. Any system which is truly representative of the present realities of "family" in contemporary cultures in the United States must be based on a heterodoxy of opinion as to what constitutes the family. Certainly, many families might find the AHEA definition too burdensome in its requirements of intimacy and sharing among all members at all times, or too rigid in excluding other more tenuous family ties. Other families might likewise reject the Pro-Family Coalition's definition because of its narrow focus on biology and orthodox marriage. A further limitation arises from the assumption, shared by both the AHEA and Pro-Family Coalition definitions, that every family relationship entails a similar amount of connection, interdependence, and commitment. However, many families comprise a variety of different family ties which presume different layers of interrelation: various levels of parenting responsibility, emotional commitment, resource sharing, and so on.¹⁰⁶

What is needed is a more pluralistic understanding — a theory of self-defining families. Individuals comprise a family because they believe themselves to be in a family; because they speak of their relationships in the language of "family." Rather than imposing a rubric of the standard nuclear family (now exposed, more often than not, as a fiction) from the outside, we must listen to the messages emanating from inside the family. Previously unacknowledged family forms — such as unmarried partners, step-families, lesbian and gay families, communal households, group parents, extended families, and foster families — achieve new validity due to the commitment

104. *Supra* text accompanying note 9.

105. *Supra* text accompanying note 7.

106. Generally, within the law, family is an exclusive relationship — either you are or you aren't. Part of this Note's agenda is to question this assumption and to leave room for a multiplicity of family relations which entail various levels of commitment and obligations without excluding others.

they exhibit: a commitment that extends not simply to the other individuals in the relationship but to the maintenance of the family itself.

This discovery goes beyond theory. Researchers have gathered evidence of self-defined families which demonstrates that even in the absence of traditional family connections, individuals feel themselves to be in family relationships. These researchers have found strong familial bonds between step-parents and step-children,¹⁰⁷ children and non-biological parental figures (including lesbian or gay co-parents),¹⁰⁸ unmarried partners,¹⁰⁹ lesbian and gay couples,¹¹⁰ and members of group and/or communal households,¹¹¹ among others. As Sandra Rovira, a lesbian co-parent, describes her relationship with her late lover's children: "We were a family like any other family, and we deserved to be treated like one."¹¹²

While this theory of a self-selected or self-defining family is somewhat comprehensive when applied to adult relationships, its complexity increases when it deals with the relationships between dependent children and their parents. Children, especially when young, have a limited ability to choose their families and have special needs within the family. They require emotional, material, and physical support; they also benefit greatly from having strong and loving relationships with adults who serve as parents, a relatively stable home environment (both emotionally and geographically), ethical and spiritual guidance, and positive adult role models.¹¹³

Because of these requirements, the role of parent has always been complex. With the increased number of divorced, step-, and non-biological parents raising children, the division of rights and obligations to children has grown even more complicated. Whereas it was once presumed that the majority of children would be conceived by, born to, and raised into adulthood by

107. Bernstein, *Unravelling the Tangles: Children's Understanding of Stepfamily Kinship*, in W. BEER, *supra* note 74, at 83-111; *see also* C. Ascher's narrative, *Stepmother*, in WOMEN AND STEPFAMILIES: VOICES OF ANGER AND LOVE 44 (1989).

108. *See* Brief for Amici Curiae of Eleven Concerned Academics, Alison D. v. Virginia M., 155 A.D.2d 11, 552 N.Y.S.2d 321 (Sup. Ct. 1990) (No. 3042E), *aff'd*, 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991).

109. *See* Macklin, *Nonmarital Heterosexual Cohabitation*, in FAMILIES IN TRANSITION *supra* note 20, at 214 (noting that commitment between members of cohabiting couples varies widely but that at least some of these couples live together in "a long term committed relationship similar to marriage").

110. *See* B. BERZON, PERMANENT PARTNERS: BUILDING GAY AND LESBIAN RELATIONSHIPS THAT LAST (1988); *see also* P. BLUMSTEIN & B. SCHWARTZ, *supra* note 5, at 502-45; D. MCWHIRTER & A. MATTISON, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP (1984); THE BOSTON LESBIAN PSYCHOLOGIES COLLECTIVE, LESBIAN PSYCHOLOGIES: EXPLORATIONS AND CHALLENGES 5-6 (1987); *Suit Over Death Benefits Asks, What is a Family?*, *supra* note 1, at B7, col. 3.

111. *See* N. STINNETT & C. BIRDSONG, *supra* note 86, at 107 (quoting a rural commune member who describes his "family" as including 16 people — five couples and their six biological children).

112. *Suit Over Death Benefits Asks, What is a Family?*, *supra* note 1, at B7, col. 3.

113. *See generally* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (2d ed. 1979) [hereinafter BEYOND BEST INTERESTS].

the same two parents, this is no longer always or even primarily the case. The combination of high divorce rates, greater geographical mobility, the construction of "alternative" families, and the growing fragility of urban community infrastructures has led to an increased likelihood of a split between the person conceiving and/or giving birth to the child and the person or persons raising her.¹¹⁴ Now that the compound notion of "parent" is more likely to be apportioned to any number of individuals, different parental roles are being distinguished. Thus, two options exist: either parenthood should be awarded to certain individuals and withheld from others, or whoever wishes to be a parent to a particular child should be allowed to be one.

The United States legal system is guided by the first principle. However, as a society we have not yet decided which aspects of parenting are essential. The law has encountered great difficulty determining which people qualify as parents: those who share a direct biological connection with the child or those who are willing to nurture and raise it. Greater complications arise in conflicts in which two or more individuals or sets of individuals who each fulfill some, but not necessarily all, parental functions simultaneously vie for an exclusive parental role.

Theory about the nuclear family is in flux. Recent scholarship challenges the traditional understanding of the nuclear family and offers alternative visions of the essence of the family relationship and its significance. These new and old definitions of family collide in the legal arena, to which the discussion now turns.

II.

FAMILY DEFINITIONS AND THE CURRENT LEGAL SYSTEM

American constitutional law has increasingly come to view family autonomy as a fundamental right.¹¹⁵ In its decisions on state regulation of the family, the Supreme Court has repeatedly attempted to strike a balance between permitting governmental intervention and recognizing the "right" of each family to be free from external control. Such ambivalence surfaces in the Court's 1943 reflection that its prior decisions had "respected the private realm of family life which the state cannot enter,"¹¹⁶ but that the family nevertheless was "not beyond regulation in the public interest."¹¹⁷ Commentators

114. Of course, adoption has always existed. However, rather than providing an ideological alternative to biological parenthood, it functioned as a direct analogue. Biological parents of adopted children traditionally give up all claims to those children. The adopted child takes her new parents' family name and in some cases is not even told that she is not their biological child.

115. While this area of constitutional law is understandably confusing and contradictory, the cases and commentary discussed below suggest that the law is moving in this direction. *See, e.g., Hodgson v. Minnesota*, 110 S. Ct. 2926, 2943 (1990) ("the family has a privacy interest in the upbringing and education of children and the intimacies of the marriage relationship which is protected by the Constitution against undue state interference").

116. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1943).

117. *Id.*

have noted that the Court has over time shifted toward a recognition that a state may not intervene in the family's private governance except in cases where it has a heightened, even compelling interest.¹¹⁸ Traditionally, courts have found such a state interest in the protection of children¹¹⁹ or the prevention of inequality or abuse.¹²⁰ Indeed, some courts have explicitly found a "fundamental right of family integrity," and have suggested that the existence of real physical or emotional harm should be required to justify state intrusion into family life.¹²¹ For this reason, the family is often regarded in law as a

118. Hershkowitz, *Due Process and the Termination of Parental Rights*, 19 FAM. L.Q. 245, 246 (1985) (citing language in *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), which discusses "the fundamental liberty interest of natural parents in the care, custody and management of their child" as evidence of the Supreme Court's recognition of the fundamental right of family independence); see also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (overturning the Virginia miscegenation statute and finding that "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness . . . [and] fundamental to our very existence and survival"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (noting that "[the due process clause of the fourteenth amendment includes] the right of the individual . . . to marry, establish a home and bring up children" without undue restriction).

119. For example, the state may require children of a certain age to attend school, see *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1924), but such interference must be balanced with a parent's right to choose the kind of school her child will attend, even if the parent's choice is a private parochial school rather than a secular public institution. *Id.* at 531, 534-35; see also *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) ("a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as . . . the traditional interest of parents with respect to the religious upbringing of their children").

120. That is, the state may act to ensure that children are cared for by fit parents, to prevent spousal or child abuse, and so forth. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 745-46 (1982) (holding that a state may "permanently and irrevocably" sever parental rights to child custody if it can demonstrate "permanent neglect" by clear and convincing evidence); see also MODEL PENAL CODE § 230.4 (1962) ("Endangering Welfare of Children") (stipulating that "[a] parent, guardian or other person supervising the welfare of a child under 18 commits a misdemeanor if he knowingly endangers the child's welfare by violating a duty of care, protection or support"); Comment, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855 (1985) (discussing criminal sanctions for perpetrators of intra-family violence). In addition, in recognition of the potential for abuse of power during the dissolution of relationships, the state may supervise divorce and custody proceedings. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 840 n.9 (1985).

However, the state does not act to prevent all forms of intra-family coercion. For example, the exemption of forced sexual intercourse between spouses from the definition of rape in the Model Penal Code (section 213.1 (1)) and the statutes of many states has been widely criticized. See, e.g., Bearrows, *Transition: Abolishing the Marital Exemption for Rape: A Statutory Proposal*, 1983 U. ILL. L. REV. 201; Hilf, *Marital Privacy and Spousal Rape*, 16 NEW ENG. L. REV. 31 (1980); Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255 (1986). For a discussion of legislators' opinions that prohibiting marital rape would be an unjustified intrusion into the family, see Olsen, *supra*, at 841.

121. For example, the right to family autonomy has been deemed "essential to the orderly pursuit of happiness," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and considered a "basic civil right," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), which is "far more precious . . . than [are] property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953). Constitutional mandates to protect the self-determination of the family have been found in the ninth amendment, see *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring), the due pro-

private social force, the existence of which the law must respect and take into account, rather than as an entity which is defined by the law itself.¹²² Although the state intrudes daily into family decision-making, such interventions have increasingly come to be seen as necessary evils to be exercised as unrestrictively as possible.¹²³

However, in the process of recognizing the unique social significance of "the family" as modern society constructs it, American law, like other disciplines, has enshrined the mythological nuclear family as its ideal model. The law acknowledges as family heterosexually-married adult partners and their biological or adopted children. In addition, it recognizes extended kin as defined by the Pro-Family Coalition's formulation of "blood, marriage, or adoption." Courts generally grant such kin a status secondary to that of nuclear family members,¹²⁴ though occasionally persons with kinship ties outside of the nuclear family may gain recognition of their ties similar to that afforded to the bonds of the nuclear family.¹²⁵ Rarely included in the equation are unmarried heterosexual partners, lesbian and gay partners, multi-adult partnerships, non-sexual/non-romantic domestic partnerships, relationships between parents and non-biological, non-adopted children,¹²⁶ friendship networks, and so on.

The dominance of the nuclear family in law arises at least in part in its

cess clause, *see Meyer*, 262 U.S. at 399; *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 639-40 (1974), and the equal protection clause, *see Skinner*, 316 U.S. at 541. For discussion of the constitutional limits which these Supreme Court decisions and others place on state actions to regulate the family, *see Stanley v. Illinois*, 405 U.S. 645, 650-52 (1972). *See also Davis v. Page*, 442 F. Supp. 258, 261 (S.D. Fla. 1977) (noting that "the right to integrity of the family is among the most fundamental rights under the Fourteenth Amendment"), *aff'd*, 618 F.2d 374 (5th Cir. 1980); *Sims v. State Dep't of Pub. Welfare*, 438 F. Supp. 1179, 1190 (S.D. Tex. 1977) (reporting the court's belief that "it is . . . clear that there is a fundamental right emanating from the Constitution, which protects the integrity of the family unit from unwarranted intrusion by the state"), *rev'd on other grounds sub nom. Moore v. Sims*, 442 U.S. 415 (1979).

122. *See, e.g., Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977) ("liberty interest in family privacy has its source . . . not in state law, but in intrinsic human rights") (footnote omitted).

123. For a discussion of the pervasiveness of this ideology in American law, *see Olsen, supra* note 120, at 839-40.

124. This is particularly true in the context of inheritance and guardianship questions. Commonly, such family members are considered untestamentary heirs or guardians only if no nuclear family member can fill the position.

125. For example, courts and commentators have in recent years begun to recognize grandparents' interest in having visitation with their natural grandchildren. *See, e.g., Note, The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 COLUM. L. REV. 118 (1986); *Note, Grandparents' Statutory Visitation Rights and the Rights of Adoptive Parents*, 49 BROOKLYN L. REV. 149 (1982); *see also Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (finding that a grandmother residing with her two grandchildren should be considered a single family for the purpose of zoning laws).

126. Recognition of parental caretakers who are not legal parents (that is biological or adoptive parents or appointed guardians) has become more common in recent years, but is still a problematic question. *See infra* notes 160-88 and accompanying text (examining new definitions of adult-child relationships in the law).

predication on the marital¹²⁷ relationship of the two heterosexual adult partners.¹²⁸ Most jurisdictions limit marriage to partners in monogamous¹²⁹ heterosexual¹³⁰ relationships which are presumed to be romantic/sexual in nature.¹³¹ Since persons whose relationships are not included within this ru-

127. The term "marital" includes common-law marriage. Common-law marriage grants marital privileges to unmarried cohabiting heterosexual partners, and as such could weigh against the claim that unmarried relationships suffer from lack of legal recognition. However, in a larger sense, common-law marriage can be seen as simply an alternative means of establishing a marital relationship. It is open to exactly the same subset of potential adult relationships, it provides the same benefits and requires the same obligations, and in almost all respects is treated similarly to certified marriage. In that sense, it is quite distinct from the situation faced by "unmarried" partners. *See generally* Kandoian, *supra* note 95.

128. The fact that children are presumed to arise naturally from such a union and are seen to complete the family seems only to emphasize that the partnership itself, regardless of its formality, initiates and circumscribes the family.

129. By monogamous I mean to indicate that marriage is intended to be exclusive, and no person is permitted to have more than one spouse. Most marriage statutes stipulate that persons applying for marriage licenses may not be married to any other person. Indeed, intentional marriage to more than one person is often considered criminal behavior. *See, e.g.,* MODEL PENAL CODE § 230.1(1)-(2) (1962) ("A married person is guilty of bigamy, a misdemeanor, if he contracts or purports to contract another marriage . . . [and] a person is guilty of polygamy, a felony in the first degree, if he marries or cohabits with more than one spouse at a time in a purported exercise of the right of plural marriage."). This may be true even if the prohibition against multiple marriage interferes with religious tenets. *See Reynolds v. United States*, 98 U.S. 145 (1887) (upholding an anti-bigamy statute against challenges by members of the Jesus Christ Church of Latter Day Saints that polygamy was a required religious practice).

A requirement of monogamy in the sense of sexual exclusivity within marriage may be enforced by the state. In states that retain fault-based divorce systems, adultery committed by one partner is grounds for divorce by the other. *See, e.g.,* N.Y. DOM. RELATIONS LAW § 170(4) (McKinney 1991). Moreover, many states retain prohibitions against adultery in their penal codes. *See, e.g.,* CONN. GEN. STAT. § 53a-81 (1990). Until quite recently such provisions were almost never enforced, but in recent years several prosecutions for adultery have gained national attention. For discussion of recent prosecution for adultery as a misdemeanor or felony offense in such states as New York, Connecticut, Wisconsin, and New Hampshire, see, e.g., *Adultery Charge Filed*, N.Y. *Newsday*, Mar. 3, 1991, at 18; *In Connecticut, Adultery Victims Call the Cops*, Chicago *Tribune*, Sept. 23, 1990, at 16C; *Adultery: It's Not Just a Sin, It's a Crime*, The Washington *Times*, June 29, 1990, at E1.

130. At present, no state recognizes legal marriage between partners of the same gender. In the early 1970s, several suits alleging that opposite-gender-specific marriage statutes violated constitutional protections were soundly defeated. *See, e.g.,* *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185, *appeal dismissed*, 409 U.S. 810 (1972); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973). For further discussion of these and other cases, see also Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN'S L.J. 135, 137-44 (1987-88). The issue has gained wide publicity recently in connection with a new legal challenge in the District of Columbia. *See Gay Couple Fights for Spousal Rights*, The Boston *Globe*, Mar. 4, 1991, at 38. Despite the non-legal status of marriages between same sex couples, many religious groups perform such ceremonies, and they have become increasingly popular in the lesbian and gay community. *See* B. BUTLER, CEREMONIES OF THE HEART: CELEBRATING LESBIAN UNIONS (1990); Pettit, *Lesbian Marriages' Tying the Knot (Noose?): Sarah Pettit on the Current Phenomenon*, OUTWEEK: NEW YORK'S LESBIAN AND GAY NEWS MAGAZINE, Sept. 18, 1989, at 38-40.

131. In fact, marriage may be legally required to be romantic and/or sexual in nature if it serves the function of ensuring one party's immigration. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 602(g), 104 Stat. 4978, 5079 (marriage fraud as a ground for deportation). Anecdotal evidence indicates that since the passage of this act, the Immigration and Naturalization

bric may not marry, by extension under traditional legal theory they also may not form families.

This lack of legal recognition of non-nuclear or kin-based family bonds creates legal disabilities for members of such families. The family's status as an important social institution is recognized through special consideration in such areas of law as the tax code,¹³² social benefits policies,¹³³ intestate succession statutes and spousal right of election,¹³⁴ proxy decisionmaking,¹³⁵ zoning regulations,¹³⁶ state subpoena power,¹³⁷ child-visitation and child-custody agreements¹³⁸ and support obligations,¹³⁹ among others.¹⁴⁰ Thus, families

Service has begun to examine closely the day-to-day family experiences of foreign nationals who marry American citizens, in order to assure that the relationship between the spouses is sufficiently intimate. See, e.g., Farrell, *For Immigrants Trying to Obtain the Coveted Green Card, Marriage May be a Treacherous Strategy*, PEOPLE MAGAZINE, Feb. 25, 1991, at 93-95.

132. Married partners have the option of filing joint income taxes and may thus pay less than the sum of each partner's tax were they to file separately. See 26 U.S.C.A. § 1 (West Supp. 1991) (tax tables); 26 U.S.C. § 6013 (1988) (authorizing joint returns by married couples). In addition, when spouses inherit from one another's estate, they are exempt from paying taxes on their inheritance; no such exemption exists for unmarried partners. See 26 U.S.C. § 2056 (1988).

133. For example, a surviving spouse may be entitled to social security benefits on behalf of her deceased partner, but no such benefits may be collected for an unmarried partner. On the other hand, some benefits may cease upon remarriage, thus privileging cohabiting partners over married ones in this situation. See 42 U.S.C. § 402(b)-(c) (1988).

134. Intestate succession statutes generally grant the bulk of an estate to the surviving legal spouse. See E. SCALES & E. KALBACH, PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 44-45 (2d ed. 1973). In addition, many states have provisions permitting the exercise of common-law right of election for spouses, so that legal spouses may not be completely disinherited from their partner's estate, regardless of the decedent's wishes. *Id.* at 74-77. Legally unrecognized partners, conversely, are not entitled to any portion of their spouse's estate except what is specifically granted to them by valid testament.

135. In the case of temporarily or permanently incapacitated adults, the state usually turns to the "immediate family" to make necessary medical decisions, and to act as guardian, should one be needed. Note, *supra* note 8, at 1031-34. One poignant example of the injustice that may ensue from such presumptions is detailed in K. THOMPSON & J. ANDRZEJEWSKI, WHY CAN'T SHARON KOWALSKI COME HOME? (1988) (describing Karen Thompson's attempts to gain guardianship of her lover, who was seriously injured in an automobile accident). Karen Thompson was recently granted guardianship of Sharon Kowalski by a Minnesota appellate court. *In re Kowalski*, No. C2-91-1047 (Minn. Ct. App. Dec. 17, 1991) (1991 Minn. App. LEXIS 1196).

136. For example, single-family dwelling restrictions in many zoning regulations are presumed to include only traditionally defined families. *But see Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (declaring unconstitutional a zoning ordinance which included a definition of family that prevented a grandmother from living with her two grandchildren in a single-family dwelling).

137. At common law, spouses were exempted from giving forced testimony against one another, and either spouse could claim the privilege. *Hawkins v. United States*, 358 U.S. 74, 77 (1958). At present, most states recognize spousal immunity, but the Supreme Court has adopted the position that only the testifying spouse may exercise the privilege. *Trammel v. United States*, 445 U.S. 40, 53 (1980). No such privilege is recognized between unmarried partners.

138. See *infra* notes 162-66 and accompanying text (discussing absolute preference given to legal (generally biological or adoptive) parents).

139. Parents are legally required to support their children financially, and spouses owe a duty of support to one another. *Patt, Second Parent Adoption: When Crossing the Marital*

whose ties to one another are legally unrecognized often lack the protections granted to legally-recognized families in these areas.

However, family ties which are not codified by law do not always go unrecognized. In some cases, courts have found family ties to exist between individuals whose relationships were not normally included within the law. In such cases, the non-legal relationship in question has generally been found to be analogous to a legally recognized family form, and the parties are therefore considered to have similar privileges and obligations as their more traditional counterparts. The following discussion addresses two areas in which these legal developments have occurred: legal recognition of non-traditional forms of partnership and acknowledgement of parental bonds outside of biological or legal parental relationships.

A. *Expansion of the Legal Recognition of Partnership*

One of the first successful challenges to the primacy of married relationships involved actor Lee Marvin and Michelle Triola Marvin. The two lived together without marrying for six years before dissolving their relationship. In a suit which drew extensive media coverage in 1976, Ms. Marvin claimed that the two had entered into an oral joint property agreement at the commencement of their relationship, which Mr. Marvin refused to honor at their breakup.¹⁴¹ The trial court in that case dismissed the action for failure to state a claim, but in a precedent-setting opinion one year later, the California Supreme Court overruled the trial court. It noted that Ms. Marvin had "the same rights to enforce contracts and to assert her equitable interest in property acquired through her effort as [did] any other unmarried person."¹⁴² Previously, such arrangements were held to be meretricious¹⁴³ and thus unenforceable in law, since public policy bars the enforcement of illegal contracts. The California Court noted that "the mores of society [had] indeed changed . . . radically in regard to cohabitation,"¹⁴⁴ and concluded that to view property or support agreements between members of unmarried couples as akin to prostitution would "do violence to an accepted and wholly different practice."¹⁴⁵ The California Supreme Court thus radically altered the legal status of cohabitating couples in its jurisdiction, and ruled that Ms. Marvin's rights were essentially equal to those to which she would have been entitled had she

Barrier is in a Child's Best Interest, 3 BERKELEY WOMEN'S L.J. 96, 123-24 (1987-88). Such legal family obligations often do not extend to ordinarily unrecognized partners or co-parents.

140. For a more detailed description of the potential disabilities that unrecognized families may face in law, see Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1642-43 (1991) [hereinafter *Family Resemblance*].

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

142. *Id.* at 684 n.24, 557 P.2d at 122 n.24, 134 Cal. Rptr. at 831 n.24.

143. That is, based on an exchange of sexual services for money.

144. 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

145. *Id.* at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831.

and Mr. Marvin been married.¹⁴⁶

In a more recent case, the New York Court of Appeals extended its recognition of families to lesbian and gay partners with regard to tenancy succession in the landmark case, *Braschi v. Stahl Associates*¹⁴⁷ The appellant in the case, Miguel Braschi, resided with his partner Leslie Blanchard in a rent-controlled apartment for a number of years. Blanchard was the tenant of record, and upon his death Braschi was served with papers asking him to vacate the premises. However, New York rent-control regulations provide that upon the death of a tenant, a landlord is not permitted to dispossess "either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant."¹⁴⁸ Braschi argued that as a member of a family with Blanchard, he was entitled to remain. The court agreed, holding that the term family should not be rigidly restricted to those people who have formalized their relationship by obtaining a marriage certificate or adoption order.¹⁴⁹ The court found that the New York legislature intended the term family "to extend protection to those who reside in households having all of the normal familial characteristics."¹⁵⁰ In an inexhaustive list of those characteristics, the court included the exclusivity and longevity of the relationship, the manner and conduct of the parties' everyday lives, and their reliance upon one another for daily family services.¹⁵¹ The court concluded that Braschi and his deceased partner's relationship amply met these criteria, and awarded him tenancy.¹⁵²

Statutory innovations have also attempted to recognize currently non-legal partnerships. One of the most publicized is the recently-passed San Francisco Domestic Partnership Act.¹⁵³ The Act provides a registry for domestic partners who live or work in the city. To qualify, a partnership must consist of two adults who are neither married nor living in a partnership arrangement with anyone else.¹⁵⁴ Domestic partnership is not the legal equivalent of marriage, since it confers no automatic recognition of partnership outside of the city; nevertheless, the act of registering as domestic partners might confer a legal obligation of support, as well as other rights and duties accorded wedded spouses.¹⁵⁵

146. Note, however, that the amount Ms. Marvin was awarded was eventually overturned; in the end, she received nothing. 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (App. 1981); *Michelle Marvin Loses Bid to Regain \$104,000 Award*, N.Y. Times, Oct 9, 1981, at A14, col. 4.

147. 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

148. NEW YORK CITY RENT AND EVICTION REGULATIONS 9 NYCRR § 2204.6(d) (formerly NEW YORK CITY RENT AND EVICTION REGULATIONS § 56 (d)).

149. *Braschi*, 74 N.Y.2d at 207, 543 N.E.2d at 51, 544 N.Y.S.2d at 786.

150. *Id.* at 211, 543 N.E.2d at 54, 544 N.Y.S.2d at 789.

151. *Id.* at 212-13, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.

152. New York has extended this reasoning to include tenancy of rent-stabilized apartments as well. See *Rent Stabilization Ass'n v. Higgins*, 164 A.D.2d 283, 562 N.Y.S.2d 962 (Sup. Ct. 1990).

153. SAN FRANCISCO, CA., MUNICIPAL CODE §§ 4001-4010 (1991).

154. *Id.* § 4002.

155. See *id.* § 4002(d).

Thus, though none has gained widespread acceptance, a number of legal innovations have begun to alter definitions of partnership to reflect pluralistic notions of the family. However, these reforms remain problematic. Rather than providing a real challenge to the primacy of the nuclear family, these changes simply extend its reaches. None of the new forms of partnership discussed above includes partnerships among more than two adults, and none permits family relationships to be formed between partners who are not romantically or sexually linked. Moreover, cases such as *Marvin* do not challenge the civil function of the institution of marriage; rather, they simply add its legal protections to another subset of relationships. These limited developments have had a positive effect in the law, yet only *Braschi*, with its recognition of legal protection for single-sex relationships, involves a significant reevaluation within the law of what it means to be a family. To date, the reasoning in that case is accepted only in one jurisdiction and only in certain narrow circumstances.¹⁵⁶ Thus the question of how we might alter the legal definition of partnership to include a pluralistic concept remains open.

Legal scholars have proposed numerous solutions for closing the gaps left in current family definitions. In dealing with partnership relations, some have argued that marriage laws must be extended to lesbian and gay couples,¹⁵⁷ while others have lobbied for widespread domestic partnership legislation.¹⁵⁸ Still others propose wholly new definitions of family which use functional tests to determine each individual's most "significant relationships," be they based on ties of blood, partnership, or friendship.¹⁵⁹

B. *Expansion of Parenting Relationships in the Law*

The non-nuclear family relationships to which courts have been perhaps most willing to grant legal acknowledgement involve children's relationships to their non-biological, non-adoptive caregivers. Traditionally, adult partners were presumed both to conceive children and to raise them within the confines of the nuclear family. Adopted children took the same place in the family as biological children. Upon adoption, all ties with their own biological parents were severed, and they became enmeshed solely within their new house-

156. For example, the Court of Appeals refused to apply the logic of *Braschi* in *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991) (woman who had live-in relationship with child's mother was not a parent within meaning of statute allowing "either parent" to apply for a writ of habeas corpus to determine the issue of visitation rights, following the termination of the parties' relationship).

157. See, e.g., Friedman, *supra* note 120.

158. See, e.g., Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *OUT/LOOK*, Fall 1989, at 17.

159. See Note, *supra* note 8, at 1074 (arguing that medical proxy courts should no longer look automatically to the nearest blood relative of the patient in question, but should turn instead to her "primary significant relationship . . . whether that be the patient's spouse, spousal equivalent in the case of unmarried adults, a close friend, or a relative"). This formulation includes partnership relationships rather than spousal ones.

holds.¹⁶⁰ With the rise of more flexible family and caregiving arrangements, however, a distinction has increasingly arisen between the work of conceiving and bearing a child and the work of nurturing one, since these tasks are often split among several persons. In order to make a determination among all of these parental figures, should such a need arise, society and courts must determine the essence of parenthood.

In cases of dispute among claimants of parental rights, courts have long used the "best interests of the child" standard to determine who should have parental rights, but exactly what this examination entails is unclear at best.¹⁶¹ Historically, the law viewed children as property of their biological parents and awarded custody based on this "right."¹⁶² Thus even as the reasoning for awarding child custody has shifted from a focus on the parent's rights to those of the child, many jurisdictions presume that biological parents have a natural right to nurture and raise their children,¹⁶³ a right that can only be infringed upon a showing that a parent is unfit or has abandoned her child.¹⁶⁴ Still other jurisdictions employ presumptions of varying weight in favor of biological parents,¹⁶⁵ but allow non-biological parents an opportunity to rebut these presumptions and petition for custodial rights.¹⁶⁶

Partly in reaction to this deference to biological parenting, Joseph Gold-

160. In fact, until relatively recently, most states required the sealing of adoption records even from the participants, in order to facilitate the fiction that the child had no other "familial" ties. See Section of Family Law Adoption Comm., *Draft ABA Model State Adoption Act*, 19 FAM. L.Q. 103, 126-27 (1985) (section 28) (providing for secret records which may be opened only upon a showing of "good cause").

161. In some jurisdictions, factors to be taken into account in determining a child's best interest are stipulated by statute. Yet the differences among such statutory guidelines is glaring. Compare CAL. CIV. CODE § 4608 (West Supp. 1988) with UNIF. MARRIAGE AND DIVORCE ACT § 402 (1970).

162. Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672, 674-75 (1942); see also Note, *Biological Parents v. Third Parties: Whose Right to Child Custody is Constitutionally Protected?*, 20 GA. L. REV. 705, 706-07 & n.6 (1986) [hereinafter *Biological Parents*].

163. In addition, many courts of the 1970s and 1980s imposed an additional presumption in favor of a young child's mother as her preferred custodial parent. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 515-16 (1984) (noting the criticism of such a presumption because of its seeming reliance on outdated stereotypes regarding women's inherent superiority in parenting, yet reporting that some theorists still argue in favor of such a formulation). More recently, commentators have urged courts to discard this standard, and instead to focus their custodial presumptions on the child's primary caretaker regardless of gender. *Id.* at 527-30. Other courts encourage joint custody between a child's parents even after the termination of their relationship; see, e.g., M. ROMAN & W. HADDAD, *THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY* (1978). Custody issues are tremendously complex; courts often have to make a number of sensitive factual determinations in order to decide what configuration of custody will serve the best interests of the child, even if presumptions are employed.

164. The Supreme Court of Kansas affirmed this standard in *Sheppard v. Sheppard*, 230 Kan. 146, 630 P.2d 1121 (1981), cert. denied, 455 U.S. 919 (1982). See S. KATZ, *WHEN PARENTS FAIL* 4 (1971); see also *Biological Parents*, supra note 162, at 708-10.

165. For a more thorough examination of degrees of parental presumptions, see *Biological Parents*, supra note 162, at 711-21.

166. Presently, 29 states use some form of presumption in favor of biological parents. *Id.* at 711 n.22.

stein, Anna Freud, and Albert Solnit published in 1973 the influential interdisciplinary study *Beyond the Best Interests of the Child*.¹⁶⁷ This work argued that if courts were truly concerned with making child welfare paramount in custody decisions, they would consider children's need for permanency and consistency in their interactions with parental figures. Thus, they proposed, the state should not interfere with the relationship between a "wanted child"¹⁶⁸ and her "psychological parent," who "through interaction, companionship, interplay, and mutuality, fulfills the child's psychological [and] physical needs,"¹⁶⁹ unless it becomes absolutely necessary.

Varying formulae in a number of cases have applied this conception of psychological parenting,¹⁷⁰ and at least one state statute has incorporated its essence.¹⁷¹ Moreover, some commentators have argued that such a standard is constitutionally mandated so that any preference shown for biological parents is unconstitutional.¹⁷²

Although the Supreme Court has not explicitly reached the question of whether biology is determinative of family relations, it has implied that parent-child relationships may transcend biological closeness in its recognition that, while the "usual understanding of 'family' implies biological relationships,"¹⁷³ such "biological relationships are not exclusive determination of the existence of a family."¹⁷⁴ Thus, in *Moore v. City of East Cleveland*, the Court concluded that a zoning ordinance prohibiting a grandmother from living with her grandchildren violated the due process clause, since "[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family."¹⁷⁵ In *Smith v. Organization of Foster Families for Equality and Reform*, the Court addressed foster parents' claim that they had a liberty interest

167. BEYOND BEST INTERESTS, *supra* note 113.

168. That is, "one who received affection and nourishment on a continuing basis from at least one adult and who feels that he or she is and continues to be valued by those who take care of her." *Id.* at 98.

169. *Id.*

170. *See, e.g.,* *Zack v. Fiebert*, 235 N.J. Super. 424, 563 A.2d 58 (App. Div. 1989) (applying "best interest" standard in custody challenge by third party, where such person can show that she stands in the place of a parent); *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978) (holding that a stepfather standing *in loco parentis* to his stepson could be considered a parent for purposes of visitation rights).

171. Oregon allows anyone who has "established emotional ties creating a child-parent relationship with a child" to petition for custody. OR. REV. STAT. § 109.119(1) (1991). The child-parent relationship is defined as one in which "a person having physical custody of a child or residing in the same household as the child supplied . . . food, clothing, shelter and incidental necessities and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs." *Id.* § 109.119(4). Note that the last phrase of the statute reflects the text from BEYOND BEST INTERESTS, as quoted *supra* text accompanying note 169.

172. *Biological Parents*, *supra* note 162, at 736-45.

173. *Smith v. Org. of Foster Families for Equality & Reform*, 421 U.S. 816, 843 (1977).

174. *Id.* (footnote omitted).

175. *Moore v. City of E. Cleveland*, 431 U.S. 494, 504 (1977).

in the survival of the family formed by themselves and their foster children.¹⁷⁶ While it decided the case on narrower grounds — namely that the foster parents' challenge to preremoval procedures failed — the Court recognized that “a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship.”¹⁷⁷ Likewise, in the earlier case of *Prince v. Massachusetts*, Sarah Prince, when convicted of violating child labor prohibitions, claimed a liberty interest in the parental right “to bring up the child in the way he should go,”¹⁷⁸ although she was not Betty Simmons' mother, but her aunt.¹⁷⁹ The Court, in reaching its decision, analyzed the case in the context of the parent-child relationship with no reference to the fact that the actual relationship was not within the traditional nuclear framework.

Thus the array of factors which a court can or must consider in deciding custody suits varies widely. Though an examination of psychological parenting rather than an absolute preference for biological parenting may open up options for the legal recognition of non-nuclear family members,¹⁸⁰ sole legal reliance on psychological parenting may also exclude some individuals whose connection to the child is primary, such as biological parents who, because of external circumstances, have not been afforded an opportunity to develop emotional bonds with the child.¹⁸¹ As a result, none of these standards may sufficiently recognize contemporary pluralistic notions of parenthood. This fact might partially explain the wide range of almost directly contradictory alternatives adopted by different jurisdictions.

In her article exploring the legal options available to lesbian co-mothers, Nancy Polikoff notes that a number of existing legal theories could be expanded in order to recognize parental rights of such non-biological and non-adoptive caregivers. Specifically, she argues that the recently-developed doctrine of equitable parenthood could be extended to such coparents,¹⁸² and the-

176. *Smith*, 431 U.S. at 839.

177. *Id.* at 844 (footnote omitted).

178. *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944). Prince was a Jehovah's Witness, and the child under her care (also a Jehovah's Witness) had been selling copies of “Watch Tower” and “Consolation,” two Jehovah's Witnesses publications.

179. *Id.* at 162.

180. As the title of Nancy Polikoff's invaluable examination of rights of lesbian coparents suggests: *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 461 (1990).

181. See, e.g., *Lehr v. Robertson*, 463 U.S. 248 (1983) (permitting stepfather to adopt a child over the objection of an unwed father who had failed to participate in his child's upbringing); *Quilloin v. Wolcott*, 434 U.S. 246 (1978) (upholding Georgia statute requiring only the mother's consent to the adoption of a child born out of wedlock, but granting veto power to an unwed father who has acted in such a way as to recognize his child); see also *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981) (finding that there exists no constitutional right to counsel in a parental status termination proceeding).

182. Equitable parenthood, as outlined by the Michigan Court of Appeals in *Atkinson v. Atkinson*, 160 Mich. App. 601, 408 N.W.2d 516 (1987), holds that a married man who had raised his wife's son for four years without knowledge that he was not the biological father of the child could not be denied custody or visitation of the child on the grounds of his demon-

ories of equitable estoppel and *in loco parentis* should include the assertion of parental rights by non-legal parents.¹⁸³

The boundaries of parenthood may extend even further, however, according to legal scholar Katharine Bartlett. In her germinal article, *Rethinking Parenthood as an Exclusive Status*, Bartlett argues that parenthood need not be limited to a maximum of one legal parent of each gender.¹⁸⁴ She notes that under our current system, one parent's legal ties to a child must often be terminated before another parent may be recognized, usually through the process of adoption.¹⁸⁵ For example, in order to secure parental rights for a married stepparent, the biological parent of that gender must agree to relinquish her parental rights; if only one legal parent exists, her legal spouse may adopt her child without the termination of her parenthood. If the legal parent is not married to her partner, however, the adoption option would not be available.¹⁸⁶ Bartlett argues for "non-exclusive" parenthood, which would allow the legal addition of as many parent-child relationships as are found to exist and are consented to by existing legal parents. Her solution avoids the legal fiction that the formation of such a relationship invalidates previous ones.¹⁸⁷

Further suggestions for loosening the legal definition of parenthood introduce the idea of intermediary parenting status. Thus, for example, stepparents who take on primary (or co-primary) parenting responsibilities would be awarded the status of "custodial parents."¹⁸⁸ As such, they would have legal status similar to that of other legal parents; however, the child's relationship with her non-custodial biological parent would not have to be terminated as adoption would require. Thus the non-custodial biological parent retains a continuing parental relationship with the child, but does not have full legal authority. This idea could be extended further to form the beginning of a system which recognized several parenting levels.

Each of these proposals attempts in some way to subvert traditional notions of legal primacy for nuclear families. Most of these suggestions are offered for the purpose of solving identified problems within the current legal system; as such, they attempt to include nontraditional family notions without altering the entire field to conform to a notion of family plurality. Neverthe-

strated nonpaternity. Since this case involves a marital heterosexual relationship, courts might be unwilling to extend its reasoning to other forms of families; yet, following the Michigan court's logic, other non-legal parents could be found to possess equitable parenthood. See Polikoff, *supra* note 180, at 483-86.

183. See Polikoff, *supra* note 180, at 492-500, 502-08.

184. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984).

185. *Id.* at 883-86.

186. Legal scholars have criticized this rule as well. See Patt, *Second Parent Adoption: When Crossing the Marital Barrier Is in the Child's Best Interests*, 3 BERKELEY WOMEN'S L.J. 96 (1987-88) (arguing for adoption by unmarried partners who function as co-parents, without termination of existing parental rights).

187. Bartlett, *supra* note 184, at 961-63.

188. Comment, *Stepparent Custody: An Alternative to Stepparent Adoption*, 12 U.C. DAVIS L. REV. 604 (1979).

less, taken as a whole, these proposals provide a backdrop for a radical analysis of potential reconfigurations of legal definitions of family.

III.

POTENTIAL REFORMULATION OF THE LEGAL DEFINITION OF THE FAMILY

If it were possible for the foundation of family law to reflect the existing pluralities of family types, how would that law look? That is, if "the family" were reconceived as a locus of endlessly possible permutations rather than as a single prototype with only a limited potential for expansion by analogy, how might a legal system which assumed multiplicity and self-determination of family forms evaluate the existence of family ties?

In Part I, I discussed how the emerging social reality of multitudinous family forms has combined with a normative critique to undermine the continuing vitality of the Parsonian model of the nuclear family. However, as outlined in Part II, "alternative" families, despite these developments, continue to face difficulties in their dealings with the current legal system in the United States, which retains the nuclear family as its mold. Even progressive developments in the courts and among commentators fail to call into question the basis of existing rules and limit their attempts to alter the legal definition of family to extending existing rules to alternative families or exempting them from the rules' coverage. In many ways, the nature of legal reasoning itself encourages this process of comparison and identification; new, unfamiliar models must be measured and classified against the old so that the existing system of laws can absorb and apply them. However, a protocol requiring the assimilation of evolving family forms into already existing models is often too limiting, and does not permit questioning of the basic assumptions built into those prior systems or of the law itself. Through cases such as *Braschi* and *Marvin*, the courts have challenged the definitions of family; however, they have not questioned the state-generated mechanism that applies these definitions. Ultimately, the current system, which flattens diversity through the process of assimilation, should be replaced by a new system that will incorporate and respect a multiplicity of family forms and the process of family self-definition.

Therefore, what the law would ideally reflect is not any one codified definition — whether specifically described, open-ended, or in between — but the beliefs and choices of family members themselves. In order to achieve this goal, the fairest legal mechanism is one that relies on a definition of family which emanates from within the relationship itself rather than one that inscribes a particular definition in the law.¹⁸⁹

189. Clearly the state would not be obligated to respect choices it finds to be coercive in any circumstance. For instance, the state could prohibit romantic/sexual involvement between an adult and a child who was not mature enough to choose for herself whether to enter such a partnership, regardless of how the state deals with family definitions in law.

In order to most honestly evaluate the virtues and drawbacks of the current mechanism of family definition, we must explore the many viable alternatives to that scheme and extend them to their limits. This exploration must make certain assumptions about contemporary society that do not, and possibly could not, exist in the real world. For example, it would require an ability to replace the existing legal order with any new system we choose. Moreover, it takes for granted that the social inequities existing now would not be exaggerated by such a change in process of family definition in law.¹⁹⁰ These assumptions are necessary because observing these systems in a comparative social vacuum provides a way in which to judge the inherent efficacy of each mechanism to redress the hierarchies of family structures. It is likely that a change in family policy would fail to radically alter the social power imbalances already extant, and possibly could not avoid reproducing preexisting inequities. Since these social inequities add to the difficulties experienced by legally unrecognized families, they cannot truly be separated from the purely theoretical aspects of this project. Yet in order to begin, this issue must be set aside, at least temporarily. Given these caveats, this project's primary goal is to open up a wider field of discourse about the possibilities for the family.

The section which follows initiates discussion on a variety of systems for legal definitions of families,¹⁹¹ untangling the ramifications of each system for

190. I recognize that this project has unrealistically utopian aspects. However, in order to envision potential social goals, we must first focus almost entirely on the special problems of the family, without becoming enmeshed in other social issues. This is not to minimize current social inequalities; it is merely an attempt to look beyond them in order to imagine an otherwise unreachable vision of representative family law.

191. The discussion of these potential systems omits consideration of the means of incorporating some important benefits currently granted to many families: for instance, health insurance, tax advantages, social security benefits, and others. The government grants these privileges to the institutionalized family, yet they are not an essential part of it (as demonstrated by the existence of legally defined families in other countries which have nationalized health care systems and public assistance schemes that do not depend upon family membership). Thus the following proposals assume that these services are not *necessarily* linked to membership in recognized family forms. Processes for distributing such benefits may, therefore, be developed without reference to family ties. For benefits such as health care, it is possible to imagine universal health systems which would include all persons on an individual basis, but even those benefits which seem more tightly bound to family relationships may be approached by other means. There is no reason, for example, that Aid to Families with Dependent Children, Social Security Act, ch. 531 §§ 401-06, 49 Stat. 620, 627-29 (1935) (current version at 42 U.S.C.A. §§ 601-617 (1991)), could not be reconceived so as to focus on economic support of children, rather than the family ties between the child and adult. Since inequalities in access to such benefits provide the most focused pressure toward expanding legal definitions of family, this is a significant omission. However, in order to examine the definitions themselves, we must look beyond economic necessity to the more theoretical issue of what *ought* to be considered a family. To serve this goal, I create the fiction that certain family-based economic entitlements which promote extra-family social functions will be met through means which do not currently exist.

Assuming that services or governmental benefits may be distributed by social programs without reference to family relationships might seem to obviate the question of why family definitions are significant in law. However, as noted in Part II, *supra*, family and law necessarily intersect in a number of areas which do not involve the distribution of economic benefits,

members of both "traditional" and "alternative" families. This discussion assumes that we are starting at the very beginning. To do so, we must imagine that categories such as "marriage" and "parenthood" do not exist in law, so that we can create them in any form we choose.¹⁹² And lastly, these explorations are not comprehensive: an exhaustive treatment of the ways in which any of these plans could be institutionalized is too lengthy and complex to tackle here.

The proposals are analyzed in two broad categories: (1) how alternative family systems impact adult partnerships, and (2) how they affect parent-child relationships. The parent-child relationship must be treated separately because of children's special needs and demands within a family. Since any system dealing with family must ultimately codify both of these types of relationships, one of the challenges of this project is to bring them together in an integrated way. Therefore, this discussion first focuses on family relationships generally, particularly as connections between and among adults define them, and then examines more closely possible legal reconfigurations in the context of parent-child relationships.

A. *Examining Legal Definitions of Partnership*

1. *Expansion of Marriage or Domestic Partnership Laws*

One modest means of recognizing non-traditional family forms within the current legal system would be to permit legislatures and judiciaries to impose a particular vision of family, but expanding that definition to allow as much individual choice as possible. Thus, as in *Marvin* and *Braschi*, rights and duties now afforded to married partners and to biological and adoptive parents would be extended to unmarried heterosexual partners, lesbian and gay couples, nonbiological parents, and so on. Under this model, however, accommodation of as many types of "non-traditional" families as possible would require changes in statutes rather than in case law.

Legislators could achieve such change in several ways. One option is to legalize marriages which are not currently recognized, such as those between more than two individuals and/or between same sex partners.¹⁹³ If the state recognized such marriages, then those members of non-traditional families who choose to avail themselves of their right to marry would automatically be

such as health care proxies, the supervision of children, and the dissolution of relationships. Moreover, as long as the law recognizes family relationships in any way, simple justice requires that all forms of family ought to be recognized equally.

192. If we do not begin from the position of a blank slate, we risk falling into a pattern of comparing "non-traditional" families with more established norms, thus elevating the latter to the status of *per se* legitimacy without conferring the same benefit on newer or less common types of families. My goal is to avoid this error by beginning with a presumption that *all* forms of family are legitimate.

193. Some have suggested that the equal protection and due process clauses of the fourteenth amendment require legalizing marriage between two partners of the same gender. Friedman, *supra* note 130, at 134.

granted family status. Alternatively, marriage could shed its civil function altogether and become a purely private ritual. Such a change would preclude anyone from attaining automatic "familiness" on the basis of marriage and would require instead that the state develop and adopt new guidelines for domestic partnership in order to facilitate state recognition of ties among families of choice.¹⁹⁴

In some ways, these two solutions both achieve the goal of equalizing the status of established family forms and newer structures, but they arise from different perspectives and could have widely diverging ramifications. If the institution of marriage were to become so loosely defined that it would be capable of including almost any grouping of persons, its usefulness as a ritualized differentiating status might be lost. Indeed, such an expansion blurs into eliminating marriage from civil consideration altogether.

From a different vantage point, however, opening up the institution of marriage to a broad range of possible partnership configurations does not adequately address the critique of marriage itself. Many heterosexual couples currently choose to cohabit rather than to marry, and thus forfeit the privileges that marriage offers within the current system. Although including many new options within the concept of marriage might introduce a flexibility which "non-traditional" partners would welcome, a significant portion of such families still might choose to forgo formalizing their relationships.¹⁹⁵ In addition to this complication, members of some types of families might not be eligible to marry even if marriage laws were pushed to their limits. Individuals who live together as domestic partners but not within romantic or sexual relationships can argue convincingly that they should not be excluded from legal recognition of family relationships merely because their partnerships are not (or are no longer) sexual. Such relationships could be included within the rubric of "new marriage," but this expansion helps less than one might initially assume. On the one hand, we have established that many levels of partnership exist, some sexual and/or romantic and others simply domestic and/or economic. On the other hand, marriage is most often construed as a comparatively exclusive romantic connection between individuals. Some individuals form domestic partnerships with people with whom they are not sexually involved, or have only been so in the past, and think of themselves as forming a committed family with those partners.¹⁹⁶ Marriage could never be expanded

194. This does not suggest that under such a system, marriages would serve no function at all; in many instances they are important ceremonies with social, emotional, traditional, and religious significance. However, such social significance need not imply civil distinction as well. For example, in the United States, no legal ramification exists for Jewish ceremonies of Bar or Bat Mitzvah, yet few would deny their vitality or importance to the Jewish community.

195. For example, lesbian and gay communities have hotly contested the issue of pressing for the right to marry. Feminist critiques of marriage as an institution have convinced many gay activists to favor dismantling the privileges accorded to marital status, rather than expanding the ranks of those eligible for such privilege. See, e.g., Ettelbrick, *supra* note 158, at 9.

196. Here we must distinguish between domestic partners and roommates. While roommates have specific obligations to each other, they do not necessarily consider themselves fam-

enough to cover all domestic partners who considered each other family but not spouses.

In either case, whether it adopts broad marriage rules or domestic partnership rules, this proposal is far from ideal. Though it goes well beyond the reforms of recent decisions, it does not question the current practice of comparing non-traditional families to those models currently recognized by the courts and society as a whole. It still posits an ultimate (if flexible) definition of family of choice through the category of "married partner," "domestic partner," or the equivalent. In order to determine who fits into that category, statutory law must establish some guidelines or standards to separate those it designates as partners from those it does not. Given these standards, if a non-conforming family form arose, the situation we experience now would be repeated: either the newly unorthodox family would go unrecognized or it would have to assimilate into a then-existing model.

A conflict lies at the heart of the question: how can we transfer the power of definition from external forces to the family itself? We may imagine a continuum of legal recognition of family forms based on the locus of definition — that is, who is doing the defining. On one end, the individuals within the family would be able to determine for themselves, unencumbered by governmental intrusion, who is included in which relationship. At the other extreme would lie a system in which the state had the authority to decide what comprised a family through legislative and judicial action. Our current system falls nearer to the side that favors state-imposed (in effect, socially-imposed) norms over free choice by individuals or groups, although exactly where our present system falls on that spectrum is a debatable point. The question is thus whether we can create a workable means of addressing family definitions in law which moves toward self-initiated family definition and away from comparison to state/society-initiated models.

2. *The Privatization of Family Relationships*

To begin such an inquiry logically, we must ask whether it is necessary for government to be involved in family concerns at all. It would be possible for a social and legal system to completely privatize family relationships. All people would simply be individuals under the law, with no legal acknowledgment of family ties or obligations. Significant social groupings would be formed privately, and while they might or might not receive social recognition, they would be legally irrelevant.

Such a dramatic change in legal structure would require a radical revision of almost all of our social systems. Since the family in part serves to privatize the provision of socially essential services, if family ties were not recognized within the law, the state would probably have to perform these functions. For

ily, or feel committed to maintaining a relationship outside of their formal responsibilities. Domestic partners, on the other hand, are family: they share a commitment which transcends their living situation and may include caring for or nurturing each other.

example, without a universal health care system or other special accommodations, everyone would have to be involved in the non-familial labor force in order to obtain health insurance. Thus either outside professional labor would have to replace the position of private homemaker, or the state would have to establish a system of wages for housework. Childcare, too, might become a paid service in many instances, or might be performed by the state. Even if individuals had the option of caring for children, such care would be based solely on choice rather than on any obligation of support, and might be subject to termination or alteration by the state for any number of reasons, since the state would not recognize any implicit right in the continuation of the child-caregiver relationship beyond the child's welfare. Additionally, if an individual died intestate, her property would revert to the state or some other organization rather than being passed on to legally-recognized family members, since no specific person or persons would be particularly entitled to inherit the property. If an individual were incapacitated to such an extent as to become unable to make decisions about her health care and she designated no proxy, such decisions would have to be handled by state agencies or through some other public means.

Obviously, because these changes would require drastic shifts in the social fabric of this country, their impact would go beyond family relations, and indeed would totally restructure the role of government and social relations. While many of the changes required might have positive implications, the ramifications of such far-reaching social upheaval are almost impossible to imagine. Moreover, as Francis Olsen points out in her essay *The Myth of State Intervention in the Family*, such a notion of complete individualism may be as much a fiction as that of the nuclear family.¹⁹⁷ In its enforcement of tort, contract, criminal, and even constitutional law, the legal system would encounter family structures even if it refused to acknowledge them as such.¹⁹⁸ Thus, its supposedly family-neutral choices in these areas would nevertheless impact on persons in family systems, while leaving no room for addressing (or redressing) that effect. As Olsen argues, the distinction between "intervention" in the family and "nonintervention" is essentially meaningless, since the law cannot help but make decisions affecting family policy by its inaction as well as by its action.¹⁹⁹ Thus, the pretense that state intervention in family can be eliminated or minimized harms, rather than supports, the protection of family autonomy.

Additionally, a proposal which eliminates legal recognition of family ties ignores the purpose of law in society generally. If we envision government as

197. Olsen, *supra* note 120, at 835, 856-58.

198. One example of the intersection between family and criminal law is the prohibitions against intra-family violence and incest. If family ties were not recognized in this area, the unique nature of this form of violence, as opposed to assault by a stranger, could not be addressed in these cases, resulting in what many would perceive as injustice. For an elaboration of this contention, see *id.* at 857.

199. *Id.* at 835.

a construct designed to facilitate the day-to-day workings of our society, then we must necessarily consider our legal system a creation of our society rather than the reverse. That is, our law should serve us, not we it. If law does not reflect or even acknowledge institutions central to our lives, then it cannot truly serve its role as a social mediator and a protector of social values. Therefore, unless we were to experience a massive societal shift away from family living, omitting family ties from the legal system altogether would greatly limit the effectiveness of law as a social tool.

A final argument against the complete privatization of family ties focuses on our present social reality. As such experiments in community-controlled human relations as Israeli *kibbutzim* have shown, people have a great investment in family connections.²⁰⁰ This is particularly true of parent-child bonds. Psychologists have demonstrated that without the loving care of at least one adult parental figure, a child will face considerable risk of emotional and developmental impairment.²⁰¹ Moreover, unless the state alone raises children, it must recognize the complex connections formed between children and the people who care for them. Nor can the importance of affectional relationships among adults be lightly dismissed. Individuals form families to provide for more than simply material needs; the broadly defined family can fulfill the strong desire for networks constituting a familiar and supportive environment. Completely privatizing the family elides our cultural reality and, as such, begs the difficult question of how to treat families within the law.²⁰²

Thus if some form of state intervention in the family must exist, the next questions are how much, and what kind. Moving backward along the continuum of state intervention in family units, the next system we might encounter would place the initiation of family definition solely with family members rather than with the state.

3. *Individually-Initiated Family Definitions*

Simply establishing more open-ended definitions in statutes and the common law might serve this latter purpose to a limited extent. For example, both the legislatures and the courts could allow all the members of a family to define themselves as constituting a familial unit based on their own notions of what relationships should be considered. Thus if family members felt that their connections through blood, partnership, or adoption were what defined them as a family, those ties would be legally recognized. At the same time, alternative groupings, such as an otherwise unrelated same-sex group of four

200. For a discussion of the development of family life in *kibbutzim*, see A. RUBIN AND B. BEIT-HALLAHMI, *THIRTY YEARS LATER: KIBBUTZ CHILDREN GROWN UP* (1982); Spiro, *supra* note 95. See also Y. TALMON, *FAMILY AND COMMUNITY IN THE KIBBUTZ* 4-8 (1982).

201. L. HOULGATE, *FAMILY AND STATE: THE PHILOSOPHY OF FAMILY LAW* 33 (1988); see also *BEYOND BEST INTERESTS*, *supra* note 113.

202. For a more thorough examination of the impracticality of legal anarchy with respect to parent-child relationships according to a utilitarian analysis, see L. HOULGATE, *supra* note 201, at 40-53.

people, could point to the emotional or economic connections among them which in their minds constituted the bases for a family. This method, operating either through case law or statutes, would have to privilege equally all types of self-defined families.

This system would work well in instances of outside attacks on a relationship such as the one exhibited in *Braschi*.²⁰³ However, if the threat to a partnership relationship came from within, for example, through disagreement over family form or over termination of the relationship, such a system would face difficulties. First, determining the validity of the family would necessitate judging one person's word against another's. Moreover, the resolution of some common familial problems, such as estate inheritance, job perks, or medical consents, would require individuals to continually prove their family relations on demand.

Of course, the assumption implicit in this model is that courts will be able to approach individual cases with an eye toward examining the unique factors in each family's situation. However, in order to save time, courts are likely to develop protocols or look to precedents for certain common predicaments despite this purposeful statutory non-definition. Perhaps they might develop tests, however informal, to measure levels of family involvement. Doing so would make the job of the courts easier and might give a greater sense of overall "justice" than would case-by-case analysis. Yet a shift toward such court-devised determinations of family ties is necessarily a shift away from the family's conceptions of its own relationships. Though it is the job of the courts to make final decisions regarding family membership under this system, the courts should do so using the family's *own* criteria, rather than substituting their judgment. Thus the almost inevitable process of simplifying the courts' task by creating even flexible general rules cannot help but subvert a system of self-defining families.

These difficulties inherent in a purely judicially-determined system of family definition, even one which values individualized and pluralistic notions of family lead to a different process which would give the power of original definition back to family members and transform courts solely into mediators rather than decisionmakers. The mechanism could be a network of (semi-) standardized declarations of relationship — partnership, parental, dependent, and so on — submitted by family members.²⁰⁴ With the establishment of a new relationship, all the adult members involved would draft a declaration, detailing the nature of the relationship and its rights, privileges, and duties, and file it with a government agency. The process could be simple. Declarations would be readily available, and relatively uncomplicated forms could cover different types and levels of relationship. Such declarations could also

203. See *supra* notes 147-52 and accompanying text (discussing the facts of *Braschi*).

204. For an argument that such a system would be preferable to one based on comparison to the traditional nuclear family, or on case-by-case functional determinations of existing family ties, see *Family Resemblance*, *supra* note 140.

function as contracts for the length of the relationship, and could be alterable or amendable at any time with the acceptance of all family members involved. This system would preempt the state's role in defining family, since the legal system could be directed to respect any such declarations regardless of content. Individuals would not have to prove the existence and intensity of their relationship every time a conflict arose because they already would have determined it through the declaration process.

Clearly, implementing such a system requires settling a number of questions. Guidelines would have to determine whether every family member would have to file for every other one, even if the relationship were comparatively attenuated (for example, great-aunts and -uncles, or relatives by marriage). Would the system take for granted kinship relationships in which all parties were independent and not necessarily sharing living space, or would every relationship have to be registered?

The resolution of these issues could take at least two possible forms. First, since declarations may lie along a continuum of levels of family, we could construct a system in which kin immediately constitutes a basic level of relation. Specific heightened kinship relations such as those between siblings might inhabit intermediate levels if so declared. Otherwise they would fall into a basic category occupied by all blood relatives.²⁰⁵ At the same time, friendship networks serving an extended family function might be declared to occupy relational levels equal to or more intense than the basic kin connections.

An alternate system might eliminate presumptions of family ties. All members of kinship networks would thus have to be declared on at least some minimal level in order to qualify as family.²⁰⁶ Choice between these two options depends mainly upon attitudes toward the power of blood ties, and each creates its own set of problems while solving others. However, both can work since each recognizes the potential significance of a multilayered extended kin network, while leaving room for acknowledgement of strong non-kin bonds.

The declaration procedure works best when all parties are independent adults: the vulnerable position of dependents assumes a great deal of trust and good faith on the part of the care-giver(s) drafting such a declaration. But even when all individuals are adults, this procedure is not trouble-free. Essentially it requires a consensus among all participants, not only on the existence

205. For example, an individual might choose to leave most aunts, uncles, and cousins with whom she had brief or no acquaintance at the first level. She might go on to declare her parents, siblings, close friends, and other blood relatives with whom she had an especially intimate relationship at some higher level, while designating her relationships with her partner(s) and children as occupying the highest level. The system might divide relationships horizontally by kind as well as vertically by intensity. Thus, a distinction might be made between coequal adult relationships and the fiduciary responsibilities that a parent-child relationship entails.

206. In this circumstance, the situation described in the previous paragraph in text would be the same, only the individual would also have to file minimal declarations for all the kin she wanted to include.

of a relationship but also on the level and kind of relationship. More attenuated family relations are especially problematic, since all members might not have an opportunity to discuss the declaration at length. Further problems arise when members of the same family want to file for different levels of relationship, or when not all members file declarations. Would the highest level of commitment apply, the lowest, or some compromise between the two? The state would have to develop some scheme to deal with these kinds of problems — a difficult task, given the complexities of these issues.

Additional difficulties might arise when the state seeks to intervene in the family in order to prevent abuse or neglect among family members. According to the principles outlined here, new goals might be needed for such legal intervention. However, none of these proposals should be taken to support the proposition that family structure may never be altered in order to eradicate such potential harm. As is presently the case, the criminal law may mandate such intervention when appropriate. For example, while children would still be removed from abusive households, the current protocols for placing them might change to include recognition of currently unacknowledged family ties. The basic right of the state to protect its citizens from intra-family violence through the exercise of police power need not be eliminated by a move toward a more egalitarian system of family definition.

However, there is another societal problem which might render this mechanism of self definition less powerful and versatile. Many people feel excluded from the legal system and do not claim the benefits and rights due to them. Such people might not take full advantage of the flexibility declarations would provide them or might fear the legal language involved in drafting and filing a declaration. One way around this widespread anxiety about the inaccessibility of legal systems would be to institute a process of yearly declarations similar to the annual filing of income declarations for tax purposes. Just as the 1040E-Z tax form was developed to simplify the previously mystified schedules of taxes, and businesses such as H & R Block arose to guide consumers through their tax returns, both governmental and private enterprises would evolve to make declarations of relationship more stress-free. Moreover, relationships would become more flexible and possibly more considered if participants had to rethink and redeclare them annually.

Though the declaration mechanism appears promising due to its democratic aspects and potential efficiency, numerous problems could result from its implementation. The sheer cost of establishing a new government agency to process millions of relationship forms every year is a major consideration. As the process of undertaking the 1990 census showed, in such a large project much information falls through the cracks, many people cannot be contacted, and bureaucratic mistakes are made.²⁰⁷ If a set of domestic partners needed

207. The 1990 census was widely criticized as underinclusive, particularly among the traditionally-underacknowledged communities in American culture. See, e.g., *Dispute Over Figures Persists*, N.Y. Times, Mar. 17, 1991, at 12LI, col. 1; *Lost Americans*, N.Y. Newsday,

their declaration and the government agency had misplaced it, would their relationship simply not exist? Furthermore, this system would not account for people so removed from the mainstream that the procedure of filing taxes or declarations of relationship is extremely intimidating.

The most significant problem with any system based on declarations, however, is the burden imposed by the exact benefit sought to be achieved. If individuals must take legal action to gain recognition for their families, what happens if for some reason they don't take such action? Two options seem apparent: either an absence of declaration could be taken as an absence of family, or the legal system could recognize undeclared relationships when it became necessary to do so.

The logic of a system premised on allowing self-determination in defining family may seem to support the former option, yet such a proposal would be clearly unjust for a number of reasons. Most significantly, an opportunity for self-declaration that does not recognize the differing opportunities of many Americans to take advantage of such a system benefits only a relatively privileged segment of society. Large numbers of people would be unable to publicly declare their family system either because of lack of access to the legal system or because of social prejudice against their chosen family. In addition, people might tend to delay acknowledging relationships that do exist, or at least resist initiating formal recognition of those relationships. Individuals may not be ready to enter publicly-acknowledged relationships; yet, when confronted with a death, disability, or dissolution, they may realize that those relationships were sufficiently influential to merit legal consideration.

If their relationships were left with no means of legal recognition whatsoever, such individuals would be at an even greater disadvantage than under the current system, in which at least their more traditional ties are acknowledged. As such, the declaration system in its pure form apparently has the potential to exclude an enormous number of families; ironically, the families likely to be excluded would more often than not be those families which the current system also acknowledges less frequently, that is, families with same-sex adult partners, or multiple-adult partnerships, and others which face social condemnation on some fronts.

The alternative, then, is to allow the state to provide back-up rules when, although there was no formal declaration, family relationships might exist. In such circumstances, the legal system would have to construct default criteria for evaluating family relationships where none were publicly documented. Yet doing so appears to lead right back to the current system of state-initiated family definition. If we conclude, however, that the state must intervene in the family to some extent in order to protect undeclared relationships, we must question the premise of a seamless continuum of state intervention in the fam-

Jan. 2, 1991, Nassau & Suffolk eds., at 44; *Half of Project Missed in Count*, N.Y. *Newsday*, Sept. 20, 1990, at 6; *Officials Nationwide Heaping Discredit on 1990 Count*, Los Angeles *Times*, Sept. 4, 1990, at A3, col. 1.

ily. The extremes of the continuum are still evident, but the distinctions among the intermediate possibilities blur. The declaration proposal began as an attempt to preempt the state and the legal system from determination of valid family forms, yet in the end it probably must rely on the state to cover the gaps left by such a system. This conclusion echoes Francis Olsen's argument that within our present judicial system some form of state intervention in the family policy must always exist, and that flexibility in limiting the frequency of such intervention is less possible than it appears at first glance.²⁰³ Since the state can affect family policy both by its action in certain circumstances and by its failure to act in others, the volume of state intrusion will vary little.

However, even if implementing a new method of recognizing family definitions in law will not radically alter the balance between legal supervision of family forms and family autonomy, alternative systems might still provide tremendous benefits. In a system based on declarations, even if the absence of declarations required courts to make determinations of family ties, the ability to avoid legal intervention by using the declaration process would undoubtedly benefit countless families which are not currently recognized. Moreover, the resulting shift in legal values toward individually-initiated family definition might affect significantly the legal process in those cases in which the legal system had to make determinations regarding family relationships. The declaration system could incorporate expanded statutory conceptions of potential family forms, as well as presumptions in favor of supporting family members' actions which demonstrate their personal notions of family. If the legal system incorporated assumptions of family plurality as well as a system of family self-definition, it would reflect families' conceptions of themselves more fairly than our current system, even without significantly decreasing the amount of state intervention in family life.

B. Examining Legal Definitions of Adult-Child Relationships

All the proposed systems discussed above share the assumption that adults can take responsibility for defining and maintaining their families. Children, however, are not necessarily able to do either of these things. Moreover, children are in an almost unique position of vulnerability and dependence for many years. How do children fit into a system of self-defining families?

After our examination above of varying models and levels of family self-definition, we must explore the incorporation of parent-child relationships into all of them. Of course, this integration could occur along the lines of restructuring present definitional processes of guardianship, custody, and the like. Since the partners of a child's biological or adoptive parents, who would not necessarily have the same biological or adoptive ties to the child, would fulfill

208. Olsen, *supra* note 120, at 856-58.

parental roles, some means of recognizing such parents must be incorporated into this scheme.

1. *Expansion of Parenthood*

The first model, which would extend current structures to include alternative conceptions of family, would most likely create a system similar to that already existing in some states. Under such a proposal, the biological or adoptive parent(s) would retain currently recognized parental rights and duties. The only substantial difference would be that these parents could be legally empowered to designate any number of additional coparents of either gender, who would also participate in the children's upbringing.²⁰⁹ These designated parents, who may or may not also be partners of the child's "primary" parents, would therefore share in childrearing. Alternatively, they might take over from biological, adoptive, or other coparents in case of extended absence or temporary inability to care for children, somewhat like temporary foster parents.

Thus, as Katherine Bartlett argues, the boundaries of parenthood would expand greatly, since parenthood could no longer be an exclusive status.²¹⁰ Moreover, just as different levels of adult relationships could exist, the law could also allow for varying degrees of parenting. For instance, in addition to primary care parents, there might be a category of full-time caregivers, or "quasi-parents," who have visitation rights rather than custody but still maintain some interest in the child's welfare. In this system, once an adult-child relationship has been formed, it must be allowed to continue in its registered form, even though it may not include full parental decisionmaking and custodial responsibilities.²¹¹ Additional issues to be settled would include: (1)

209. Of course, simple designation might not be enough. We might also require that the parent so designated actually form a parenting bond (as defined in *Beyond Best Interests*, *supra* note 113) in order to "activate" the designation, to be determined by either the other parents, the state, or some combination.

210. Bartlett, *supra* note 184, at 879-83.

211. This assumes that the relationship is beneficial to the child, *i.e.*, is not abusive or detrimental for other reasons. If a relationship were found to be detrimental, the state or other co-parents would have the right to terminate or limit the adult's contact with the child. The most difficult question arises when there is a disagreement among coparents or between coparents and the state as to what constitutes harm to the child. We might conclude that if families are to have self determination, then the opinion of a majority of parents, or all parents if the disagreement is with the government, should be binding. However, we may also conclude that society would abdicate too much of its responsibility for children's welfare if state agencies were not allowed to intervene on behalf of children thought to be in danger. Perhaps we might choose to permit any party interested in the child — that is, any coparent, or any state agent acting on behalf of society — to call for a hearing if it is alleged that a child is in an abusive or otherwise harmful relationship. At such a hearing, great weight might be given to the opinions of all coparents, but ultimately a decision would be rendered by the judiciary.

Such a solution is not radically different from our current legal approach to allegations of child abuse. With the possibility of more primary and secondary parents comes more potentially abusive relationships, but also a potentially greater number of responsible adults who can intervene and care for the child. It is possible, then, that there will be less occasion for state

whether new coparents would have the same rights and responsibilities as the "original" parents; (2) whether coparents could designate new coparents; (3) whether parents or coparents could "undesignate" themselves; and (4) what would happen to the child if the relationships among the adults became contentious or dissolved.

The answer to the first question seems to imply certain logical conclusions to the others. If all coparents are considered equal, then each should be able to designate new parents. Since each parent assumes responsibility for the care of the child, if any coparent were allowed to "undesignate" herself, it would probably have to be with the consent of some or all of the other coparents, with at least one parent remaining to care for the child. "Divorce" or dissolution among adult relationships would have to be settled either by granting joint custody to all coparents or by granting custody to one person or non-contentious group, and visitation to all others where feasible.

If, on the other hand, new coparents were considered "secondary," it would follow that they might not be permitted to add new coparents to the pool. Perhaps secondary parents would be allowed to "undesignate" themselves more easily than primary parents, and would be guaranteed only visitation, rather than custody, in the event of a court-mediated dissolution agreement.

A final scheme might allow new coparents to be considered secondary at first, but later elevated to primary status should their involvement in the child's life warrant such recognition. Such relationships exist to some degree now, albeit mostly informally. Arguments for such changes as the recognition of stepparent custody discussed in the previous section²¹² recognize that the current legal system could be more flexible in terms of dividing and parceling out parental rights. Under this system, the state would act in the same capacity that it does currently. Primary parenthood and newly-designated "secondary" parenthood would be recorded by the state, and disputes or crises in the family would be examined and decided by the courts. In addition, the judiciary would determine custody of the child if circumstances warranted it, though it would have to take into account the importance of continuing parenting relationships, and should probably grant at least some form of continued visitation with all primary and secondary parents whenever possible.

2. *Individually-Initiated Parenthood Definitions*

This system of non-exclusive parenthood might also be incorporated into a structure that permits greater self-definition, such as the declaration mechanism described above.²¹³ Adults would be able legally to designate different levels of parenthood through a simplified process of filing standardized forms.

intervention, but it seems more likely that if the state is to be involved at all, that it will end up taking an active role in mediating and ultimately deciding disputes over allegations of harm.

212. See *supra* note 170.

213. See *supra* notes 204-08 and accompanying text.

Such a procedure, however, would have many of the same problems the system would exhibit when dealing with adult relationships, problems which would have heightened significance due to the special needs of children. Since this proposal negotiates the extremely difficult ground between psychological ("the best interest of the child") and biological parenthood without trying to codify either standard into law, issues of parental "appropriateness" take on greater significance. For example, what happens when adults cannot agree upon their respective levels of parental rights and responsibilities? Of course, the state could develop categories of parenting into which individuals would fall. But a more consistent method of resolution would require focusing primarily on the decisions, declarations, and actions of the primary parents, since in them lies the initial right to designate alternative or additional parents.²¹⁴ This method will not resolve all conflicts, especially when two previously primary parents want to gain sole custody. In that case, the courts would have to decide whether both should share primary parenting (similar to present joint custody), or if they should have different levels of parenting.²¹⁵ However, unless a parent were unfit to look after the child in any way, no adult who had established a parenting relationship with the child would be deprived of all participation in the child's upbringing.

We may also want a system of relationship declaration which recognizes maturing children's desire to file for themselves. Limits may exist on how old children must be before they can file certain declarations such as partnership. However, just as adults should be entitled to initiate their own understanding of the family relationships they create, children should be permitted to define their relational circle and take an increasing responsibility for those connections as they mature.

As we have seen, strict reliance on either biology or psychology as sole qualification for custody of children can elide important auxiliary ties and in fact injure a child's development. Thus, whatever system we implement would have to make allowances for both biological and emotional connections. The systems suggested here reserve the initial power of decision-making regarding who may become a (co)parent to the adults who first take responsibility for the child.

214. The original primary parents under this system would be those who originally intended to create and nurture the child, regardless of whether they were biologically related to her. We might not want to ignore biology completely, however. Perhaps some people, based on their biological ties would be given an opportunity to develop either a primary or secondary parenting relationship. Should the potential coparent not avail herself of this opportunity, it might be considered void after significant amount of time had passed, or the opportunity might be available until the child reached the age of majority or at least maturity.

215. If coparents were to separate and form new adult partnerships, those new partners who began to act as either primary or secondary coparents might become designated as such. As outlined in the previous section, the system might permit any primary parent to designate new coparents, or might instead require consensus among all coparents, or all primary coparents.

CONCLUSION

When the law integrates family into its systems, it does not create a new sense of what family is; instead, it simply encodes what it sees as "natural" rights. Through the influence of social scientists such as Talcott Parsons, this "natural" family came to be understood as one based on the nuclear model — two married adult partners of opposite genders and their biological or adoptive children. Yet the primacy of this model has been exposed as a myth. The nuclear family is not, and possibly has never been the lived experience of a majority of Americans, and many people question the traditional roles expected of its participants.

Nevertheless it is this idealized vision which has shaped legal approaches to family relationships. The presumed centrality of nuclear family ties necessarily excludes most other possible family structures within the law. An ideal alternative to this exclusion would require self-definitions of family which would be respected by the legal system.

However, an entirely individualized, case-by-case definition of family would be almost impossible to implement. Some sort of outside definition — either preemptive or after-the-fact — would have to arise to deal with the difficult conflicts which would inevitably arise and be brought before courts for resolution. The other alternative is to privatize the family by removing it from the law completely. But this possibility, through its refusal to acknowledge relationships which are clearly important to their participants, seems to increase inequities rather than palliate them.

These dilemmas do not mean that the present system of law cannot shift toward an increased reliance on individual definition of family — that is, toward giving priority to the value and characterization each family takes for itself. In some ways, changes like the one instituted in *Braschi* have made steps toward this goal, though they do not go far enough. The *Braschi* decision may open the door for alternative families, but we want to build a new house altogether.

But how can that house be constructed? Throughout this Note, I have proposed many options for family law and explored the weaknesses in each. However, I am aware that I, too, write from a defined perspective. I am not attempting to set forth a definitive interpretation, but I do believe that through explorations like the one I have undertaken, legal scholars can begin to understand these issues better and to move toward consensus.

Rather than simply attempting to alter legal protocols, legal scholars and practitioners need to question legal values and the way those protocols and values intersect. Of course, within case law, an accumulation of a new set of values creates precedent for new structures. *Braschi* is an excellent example of this. However, the vision here is more complete: we must actively engage the law to institute a presumed diversity of family forms. Perhaps out of the recognition of this diversity, new mechanisms will be developed to deal with the

expanded understandings of "valid" family forms. This is not to say that the law would organically develop progressive structures to rebuild family law. On the contrary, these kind of changes require hard work from judges, legislators, family lawyers, and families themselves. The most important part of this project will be its insistence upon examining itself and its own motivations. It continually asks the question left unacknowledged and unrecognized by present family law: what is family?