Chapter 7

The Family and Public Policy

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INTRODUCTION

> What is a family? Should the law recognize it as a functional unit, or as merely as an aggregate of autonomous individuals? When, if ever, is the distinction meaningful? Why is the concept of "family" important? When, if ever, should government intervene in its affairs? How should government deal with families and their problems?

These are but a few of the many questions which arise when the law attempts to deal with "family" issues. With the advent of government programs intended to facilitate and support family

life,[1] and the ever-expanding judicial recognition of "privacy" rights for family members,[2] the courts have become increasingly involved with diverse value questions involving marriage and divorce,[3] the rights of parents and children,[4] the rights of grandparents,[5] sexuality,[6] education and moral training,[7] family health questions,[8] and intra-family dispute resolution.[9] The purpose of this short introduction to what is both a complex and immensely interesting area of the law is to identify some of the cross-currents and directions in contemporary state and federal family policy, with particular emphasis on their relationship to the statutory and constitutional law of family rights. It is intended to lay the foundation for the oral presentation of which it is a part. The oral presentation will argue that it is essential for those who claim to be concerned about the health and status of the family to establish clearly, at the outset, precisely what their vision of "the family" is. Without a clear impression of the ultimate goal, useful discussion of policy options leading toward attainment of the goal is difficult, if not useless. This introduction, therefore, will begin with a working definition of what most people — and most policy formulations — consider to be "the family" unit; it will suggest several possible conceptual frameworks for analysis of decisions dealing with what might be called "structural" family law issues; and it will introduce some of the statutory and judicial developments in several areas of particular concern to parents, religious institutions, policy-makers and scholars.

I. "FAMILY" — REFLECTIONS ON THE CONCEPT AND ITS DEFINITION

A. Defining the term "family"

Perhaps the most difficult task which besets the observer of contemporary American family policy is to define the term "family" without immediately plunging into a host of related, yet distinct, controversies. But without a working definition, meaningful discussion of the many complex legal and social issues involved in even the most straightforward family law problem is virtually impossible. Thus, for purposes of this chapter, a "family"

will be defined as a group of individuals who are related by blood, marriage or adoption living together as a unit which contains at least one natural or adoptive parent and children. This definition, while somewhat restrictive in terms of the possibilities for more "expansive" definitions of family "membership", is not unlike the more traditional sociological definitions of Burgess, Locke and Murdock[10] which focus on what most observers call the "nuclear" family. More importantly, it is also the "family" with which the vast body of American law concerns itself.[11]

By defining the term "family" in a broad, yet traditional, manner one obviously excludes other voluntary associations of individuals which function, either in practice or by design, in much the same manner as traditional families, but which are not commonly perceived as fitting into that category. Examples of such groupings would be married or unmarried, childless, cohabitating heterosexual couples, cohabitating homosexual couples and communal living groups.[12] A discussion of the special issues raised in each of these cases is beyond the scope of this chapter, but it is important to note that they are excluded here for a very specific reason: semantic clarity. Current sociological literature does not contain a clear definition of the term "family", and the definitions which are found often implicitly, rather than explicitly, reflect the philosophical biases of the writer with respect to the related, yet distinct, issues which are raised in the notes and which will be discussed in the oral presentation.[13] The historian Alan C. Carlson discussed this problem in his article, "The Family: A Problem of Definition"[14]:

> Semantic clarity progressively deteriorated . . . as the discipline embraced the heretofore unknown notion of a "pluralism of family forms." An important benchmark of such change was the Forum 14 Report of the 1970 White House Conference on Children, which celebrated a "pluralistic society of varying family forms and a multiplicity of cultures." Defining family as "a group of individuals in interaction," the Report described optional forms, ranging from nuclear families to "single parent," "communal", "group marriage," and "homosexual" varieties. Decrying American society's excessive

> conformity, the Report's authors welcomed the contemporary movement "to destroy the cultural myth of a 'right' or 'best' way to behave, believe, work, or play." As family professionals, they viewed the family principally as "a vital, yet often unrecognized partner of bureaucratic service organizations having health, welfare, and rehabilitative objectives." Secure in such a controlling partnership, their primary recommendations focused on recognizing and fostering "the right of individuals to live in any family form they feel will increase their options for self-fulfillment."[15]

The significance of such semantic confusion for the development of law and public policy should not be underestimated.[16] Law is influenced by the other social sciences, and they often play an important role in defining legal relationships. Some of the most important constitutional decisions governing basic social and legal policy rest explicitly on somewhat controversial non-legal conceptual approaches to the issues which were presented for decision,[17] and the current constitutional law of family rights is not without its examples of reliance on such material. A fixed definition of the term "family" is therefore crucial if the participants in the discussion are to fully understand one another.

B. The Significance of Affinity

Once having provided a working definition of the term "family" for purposes of this discussion, it is also important to appreciate the significance of affinity to the analysis. Although Murdock has pointed out that the nuclear family includes the four most fundamental functions of human social life: the sexual, the economic, the reproductive, and the educational,[18] it goes without saying that the force which ties these functions together and which enables families to interact as a unit is emotional. The significance of this observation is twofold: first, it helps to define the character of the social grouping under study; and second, it limits the ability of the law to affect fundamental changes in family structure without also revising large areas of related legal theory to reflect the changes thought to be desirable.[19] The law, in short, both defines

and is limited by the "family". "Family law," therefore, has the power to affect some degree of fundamental change in that which the "family" is and does.[20] In a representative democracy, such power is significant, not only for the individuals affected by it, but for the society as a whole. Thus, it only stands to reason that governmental "family policy" should be scrutinized — as a whole — from this perspective.

The law draws its customary deference to familial ties from simple observation of human relationships: from the basic emotional ritualism which develops in the interactions of a mother with her infant child,[21] to the highly complex expectancies which develop among spouses, parents and children, and siblings. As a result, American law[22] defines the family relationship as one which is deserving of the same level of protection as an express constitutional right,[23] and it has generally sought to insulate that relationship from outside influences which are not intended to deal with a specific threat to the health or welfare of the family or its members.[24] It is only when the law seeks to foster policies which are at odds with familial choices that actual attempts to regulate intra-family relationships are imposed.[25] Whether such regulation is appropriate or legitimate in a given context depends, of course, on the policy involved and the interests affected. Whether such policies will work as planned without unintended negative consequences, even if otherwise appropriate, is another matter entirely.[26]

In his 1969 essay, "Human Interaction and the Law," Professor Lon Fuller pointed out that the qualities of enacted law which "lend to it a special capacity to put in order men's interactions within the larger impersonal society" are "the very qualities . . . that make it an inept instrument for regulating intimate relations" within the family.[27] Professor Caplow explains:

> The family depends for its continuance, either abstractly as an institution or concretely as an individual family, on the maintenance of certain sentiments, obligations, and reciprocities that are neither automatic nor self-generating. The reasons why husband and wife cleave together, why children honor their parents, and why brothers do not take pay from each other are not derived

> from the state or its secular culture. There are moral sentiments underlying the interactions that constitute the family: otherwise, there would be no family. Self-interest alone will not account for them, and the legal order cannot enforce them.[28]

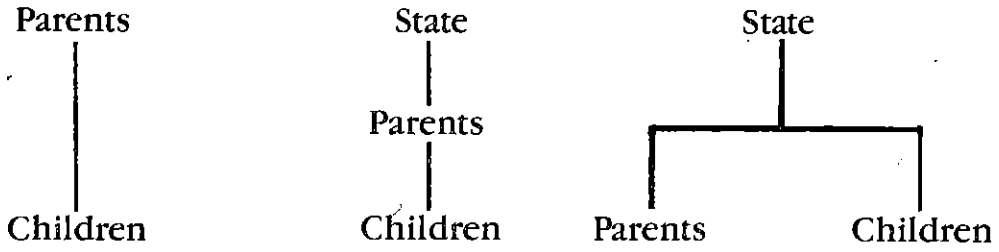
Since the family is not a creature of the law, and its relationships and obligations are neither created by nor generally enforced through legal means, it is critical that the student of family law policy distinguish between the law's recognition of what is (its descriptive function), and its attempts to define what should be (its normative function). Of equal importance is the frank recognition that the ability of the law to enforce a policy which is intended to effect a non-destructive change in the fragile fabric of intra-familial relationships is often dependent upon the understanding and creative ability of the policy-maker, who must adapt traditional formulations of legal rights and duties to the reality of family life.

II. CONCEPTUAL MODELS OF FAMILY/ GOVERNMENT RELATIONS

An examination of the law of family relations would be incomplete without some discussion of the various conceptual approaches to family law issues found in the literature and the cases. Although judicial respect for the integrity of the family unit is often cited as a rationale for decision in cases which have grave implications for individual families,[29] an understanding of the conceptual approach employed to decide the case or resolve the issue is a far better key to the sincerity of the concern than the words of the opinion. The conceptual models suggested below are intended to illustrate several possible ways to view the state/family relationships which appear in the cases. Each contains three basic elements: parents, children and the state as *parens patriae,* and each model is, to some degree, involved in the decision of nearly every family law issue. The listing below is not meant to be exhaustive; it merely reflects some of this writer's observations on the subject.

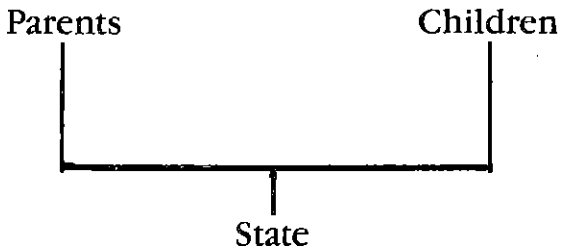
A. The Linear Model

The first of these conceptual models is linear. It posits that either the state or the parents are the primary source of family rights and obligations. In this, and all subsequent models, responsibility for the morals component of family life is equated with the parental role. It should be apparent that an absolutist application of either form of this model would result in the extremes of intervention or isolation. In graphic form, the variations on the model would appear as follows:



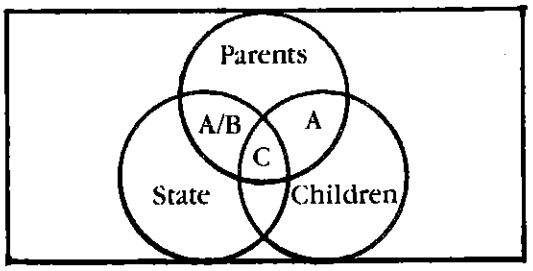
B. The Balance Model

The second of these conceptual approaches is best described as a "balance" wherein the state mediates disputes by weighing intra-family interests in accordance with the weight assigned by current public policy. Although the state would, in the ideal situation, play the role of an entirely neutral arbiter, such a role is, in fact, a practical impossibility; for it is the state which assigns the weights to the respective interests and the state which determines the legitimacy of the type of intervention described by this model in the situations in which it applies.[30]



C. The Interests Model

The third approach can best be described as one which examines "interests" in much the same manner as the late Professor Branerd Currie's "interests analysis" approach to difficult issues of public policy arising in the area of Conflict of Laws.[31] A problem involving important family interests is examined to determine whose interests are involved, whether they are in conflict, and, if so, whether their apparent conflict can be resolved without damage to either the interests of the respective parties to the dispute, or to the basic family relationships which will be affected by the resolution of the dispute. In cases of "false" (i.e. no) conflict, the matter is resolved in accordance with the best interests of the party affected. In cases where the conflict is "apparent" (i.e. apparently real), the interests must be examined to determine whether there is, in fact, a "true" conflict. In those rare cases where a "true" (i.e. unavoidable) conflict is presented, the rule of decision must be taken from the basic conceptual principles which the society employs to resolve issues of fundamental social importance. (e.g., constitutional or moral principles concerning "right" or "just" relations among the state, parents and children). This approach can best be illustrated through the use of the following diagram:



A = Family Unit Interests (Parents & Children)

B = State Interests

C = Shared Interests

While there may be other conceptual approaches to family/state relations, it should be apparent that the three chosen here for illustrative purposes are not mutually exclusive. They may be applied alone or in conjunction in a wide variety of situations. It should also become apparent upon examination that the distinctions between them is a given case can often be more apparent than real. They are mentioned, therefore, only as a convenient way of organizing an introduction of the rather distressing tendency of

recent case law to utilize an almost purely result-oriented approach to the decision of extremely difficult intra-familial problems.

III. IDENTIFYING THE ISSUES

> The unique role in our society of the family, the institution by which "we inculcate and pass down many of our most cherished values, moral and cultural," requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children.[32]

The foregoing statement of principle has been reaffirmed by the Supreme Court as a guide for judicial decision-making on many occasions,[33] but the sensitivity and clarity of analysis required to do justice to the sometimes clashing interests involved in cases which involve potential intra-family or state/family disputes is often lacking when the rationale supporting recent judicial decisions is examined.[34] The reasons for this lack of sensitivity for the interests of the family are easy enough to discern, but they are tremendously difficult to work with, for both political[35] and policy reasons.[36] For precisely such reasons, it is rare indeed when either a court or other policy maker will set forth the underlying philosophical or political assumptions upon which the decision rests.[37]

The common law imposed a duty on parents to care for, protect and guide their children and allowed delegation of that duty to others, but such delegation was not operative to grant prerogatives coextensive with those of the parents.[38] Recent developments in family policy, however, rest on a perception of the family very different than that of the common law and most current statutory law. It holds that parents exercise only powers delegated to them by the state, and that the governmental recognition of parental prerogatives is limited by currently accepted constitutional limitations on the power of the states to interfere with individual liberty.[39] It is within this shifting conceptual framework that much of the current debate over "family", "parents'" and "children's" rights occurs. Because parents continue to fulfill the role of guardians of their childrens' health, welfare, safety and morals; and because the law continues to presume that children lack the

capacity to choose their own style and philosophy of self-governance,[40] parents continue to be recognized as being responsible for nurturing and developing their children's capacity to function indpendently and make reasoned life choices. It is only when those choices involve controversial parental value judgments which are not in accordance with judicial or professional opinion that the difficulties described in the notes begins. Unfortunately, the rhetoric employed by most parties to the various controversies tends to focus on "rights" and "status", rather than interests and capacity. Some writers have even gone so far as to portray the possible range of status choices for children as limited to either total libration or serfdom,[41] and the result has been, quite predictably, confusion and the development of a fair amount of bad law and questionable legal reasoning.

Because an approach which emphasizes only rights and status leaves very little room for compromise, the unfortunate result appears to be a trend toward respect for the family as a unit only when it serves the specific policy purposes of the legislative or judicial decision-maker. Given the importance of the substantive constitutional rights of the family members involved in such cases, it should be clear that governmental tinkering with family structures in pursuit of policy which is either ill-defined or lacking a base of broad public support is a serious matter indeed.

As a result, development of a sensitivity for the needs of the family as the unit of society which performs the basic tasks of nurturing, educating, and socializing children should be one of the major goals of this conference and should rank high on the list of future topics for pastoral guidance on the part of the Church as a whole. But before such guidance is attempted, every attempt to attain a clear understanding of the influences of traditional and emerging sociological, philosophical, psychological, and legal theory on those interests should be undertaken. The reasons for this suggestion should be obvious to anyone with a desire to influence the course of public policy development in a manner which is consistent with the long-term protection of the family, and of Church itself; for it goes without saying that the Church could not survive in its present form without the assistance it receives from dedicated parents who pass the faith on to their children by both word and deed.

Because the processes of American law are both incremental and dynamic, it is absolutely essential that the participants in the process have a clear understanding of the degree to which their own goals and philosophy are reflected or rejected in recent developments in the law. If the current result-oriented trends which prompt this writer's concern are to be reversed, the approach taken by proponents of family integrity must be both forthright and uncompromising; for if issues of constitutional and moral principle are seldom perceived as negotiable, one can be certain that issues of family integrity will never be when the issue is joined directly.

Among the questions which should concern this conference are: the ongoing debate over the rights of the child as an individual *sui juris* within the family; the relationship of constitutional and statutory emancipation to the rights and duties of parents; and the meaning and potential uses (and abuses) of a broad concept such as "the best interests of the child". Because public policy discussion concerning family issues often proceeds on the assumption that someone's "rights" or "best interests" should be "protected" by (or from) government intervention, and that it is improper for anyone to "impose" any sort of rigid philosophical structure on discussions which have moral dimensions,[42] the proper analytical perspective is one which seeks to identify what — and whose — interests are being served by existing or proposed public policy formulations. Thus, it is critical for the student of family policy to scrutinize both the practical and the theoretical implications of government intervention in family affairs, especially that which involves fundamental decisions concerning the welfare of children and the preservation of the family structure. Although all government intervention in family life is a serious matter and warrants careful scrutiny, much of it is clearly beneficial and intended to preserve the family as a functioning unit.[43] But other forms of intervention, such as emancipation by recognition of constitutional or legal rights enforceable against the parents,[44] or by governmental action on behalf of a minor child which is said to be in the "best interests" of that child when there has been no prior showing of parental neglect or unfitness,[45] are not designed to preserve the functional integrity of the family unit, but rather to fur-

ther other interests which may or may not be beneficial to either the family itself, or to the individuals in whose name the intervention proceeds.

This chapter will serve as a brief introduction to some of the legal and public policy arguments over family and child-centered rights to make important, life-influencing decisions concerning education, life-style, health care and moral training of children. It is hoped that, given the importance of the subject matter, the readers of this book will consider carefully their own role in the future development of public policy on this important topic.

Notes

1. *See, e.g.,* 40 U.S.C. section 484b (transfer of surplus real property to low income families and others); 42 U.S.C. ss 300z(b), 606 (family-based sex education programs, aid to families with dependent children); 43 U.S.C. section 433(a) (preferences for needy families in newly-opened irrigation projects). For an overview of some of the programs, suggestions for programs and the rationale for government interaction with and support of family life see *The Report "Listening to American Families"* (White House Conference on Families, October, 1980).

2. *See, e.g., Akron v. Akron Center for Reproductive Health,* — U.S. —,103 S.Ct. 2481, 76 L.Ed.2d 687, 701 n.10, 708-710 nn.29-31, 728-729 & n. 12 (1983) (majority opinion per Powell, J. and dissent per O'Connor, J.) (parental/judicial notice/consent for abortion); *Planned Parenthood of Kansas City, Missouri v. Ashcroft,* — U.S. —, 103 S.Ct. 2517, 76 L.Ed.2d 733, 744-745 & nn. 16-21) (same); *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976).

3. *See* generally, B. C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests,* 81 Mich.L.Rev. 463 (1983).

4. *See, e.g.,* Cal. Civil Code, ss4600,4600.5. (West) (joint custody after divorce). *Carey v. Population Services International,* 431 U.S. 678 (1977); *In re Snyder,* 85 Wash. 2d. 182, 532 P.2d 278 (1975).

5. *See, e.g.,* 25 U.S.C. s1914 (placement of American Indian children); Ark. Stat. Ann. section 34-1211.1 (Supp. 1977) (visitation); Cal. Civ. Code ss 197.5, 4601 (West supp. 1978) (same); Mich Comp. Laws Ann. 722.27a (Cum. supp. 1977-78) (same). *A.B.M., Natural Mother v. M.H. & A.H., Prospective Adoptive Parents,* 651 P.2d 1170 (Alaska, 1982) (statutory preference); *Smith v. Smith,* 270 Cal.App. 2d 605, 75 Cal. Rptr. 900 (1969) (adoption); *People, in the Interest of P.D., formerly M.A.D., a child, V. M.G.,* 41 Colo. App. 109, 580 P.2d 836 (1978) (custody, support, right to terminate); *In the Interest of Summers Children v. Wulftenstein,* 571 P.2d 1319 (1977) (applying rule that grandparents have "some dormant or inchoate right or interest in the custody and welfare" of their grandchildren). *See generally,* Grandparents' Visitation Rights: Hearings on S. Con. Res. 40 Before the Senate Subcommittee on Separation of Powers, "The Legal Rights of Grandparents in Domestic Relations Cases Involving Issues Other Than Visitation Rights" and "The Legal Rights of Grandparents in Domestic Relations Cases" (statements of R.A. Destro and L.S. Mullenix) (collecting cases and other sources).

6. *See, e.g., D.H. v. J.H.,* 418 N.E.2d 286, 290-293 (Ind. App. 1981); *Schuster v. Schuster,* 90 Wash.2d 626, 585 P.2d 130, 134 (1978) (en banc) (Rosellini and Hamilton, J.J. and Wright, C.J., dissenting).

7. *See, e.g., Board of Education v. Pico,* 457 U.S. 853 (1982) (community control of public school library materials); *Doe v. Irwin,* 428 F.Supp. 1198 (W.D. Mich., 1977), *vacated and remanded,* 559 F.2d 1219 (6th Cir. 1977), *aff'd on remand,* 441 F.Supp. 1247 (W.D. Mich., 1977), *rev'd,* 615 F.2d 1162 (6th Cir. 1978) (parental notice prior to involvement of children in publicly-funded educational program involving discussion and evaluation of issues involving sexual morality); *Kendrick v. Heckler,* Civ. No. 83-3175 (D. D.C.) (pending) (constitutionality of Adolescent Family Life Program).

8. *See, e.g., United States v. University Hospital,* — F.2d. —, No. 83-6343 (2d Cir. filed Feb. 23, 1984) (Baby Jane Doe).

9. *See, e.g., In re Snyder,* 85 Wash. 2d. 182, 532 P.2d 278 (1975).

10. *See* E.W. Burgess and H.J. Locke, *The Family: From Institution to Companionship* (New York: American Book Co. 1945) at 510-511; G.P. Murdock, *Social Structure* (New York: Free Press). *See also* A.C. Carlson, *"The Family: A Problem of Definition,"* 6 Human Life Rev. 41 (Fall 1980) (collecting these and other sources) [hereafter cited as Carlson].

11. *See, e.g.,* 5 U.S.C. s 8701(d); 18 U.S.C. s 1116; 25 U.S.C. s1903 (extended family member);, 26 U.S.C. 613(a). *Moore v. City of East Cleveland,* 432 U.S. 494 (1977) (extended "nuclear" family); *May v. Anderson,* 345 U.S. 528 (1953); *Lehman v. Lycoming County Children's Services Agency,* — F.2d —, 49 U.S.L.W. 2642 (3d Cir. 1981) (child custody). See also sources cited at note 5 *supra.*

12. *See, e.g., Re Adult Anonymous II,* 88 A.D.2d 30, 452 N.Y.S.2d 198 (1st Dep. 1982) (homosexual adoption).

13. *See* sources cited in Carlson, *supra,* note 10. *See also,* J. Hitchcock, *Family is What Family Does,* 4 Human Life Rev. 52 (Fall, 1980).

14. Carlson, *supra,* note 10.

15. *Id.,* at 47.

16. In *Re Adult Anonymous II,* 88 A.D.2d 30, 452 N.Y.S.2d 198 (1st Dep. 1982), the Appellate Division of the New York Supreme Court made the following comments regarding the existence of homosexual "families". Although the issue was whether or not a man could adopt his homosexual lover, the case is significant for what it says concerning both the definition of the term "family" for legal purposes as well as the mechanisms by which such definitions develop. The court stated:

> Homosexual relations in private are now constitutionally protected. *People v. Onofore,* 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936, under the right to privacy. In any event the parties do not seek the adoption in order to cultivate their sexual relationship. They wish to formalize themselves as a family unit, for the purposes of publicly acknowledging their emotional bond and more pragmatically to unify their rights. . . .
>
> The "nuclear family" arrangement is no longer the only model of family life in America. The realities of present day urban life allow many types of non-traditional families. The statutes involved do not permit this court to deny a petition for adoption on the basis of this court's view of what is the nature of a family. In any event, the best description of a family is a continuing relationship of love and care, and an assumption of responsibility for some other person. Certainly that is present in the instant case." 452 N.Y.S.2d at 201.

The analytical method employed in the court's opinion is immediately apparent upon examination. First, the court finds that the case involves the right to privacy, in that New York's highest court, the Court of Appeals, has decided that consensual homosexual activity in private is constitutionally protected; second, it extrapolates from the existence of the privacy right to the position that the admitted existence of such activity within an adoptive parent/child relationship should not be considered by the court — or, by implication, the state — in the determination of whether the adoption is in the "best interests" of the adoptive child; and third, the court recites the "pragmatic" reasons for its decision to permit the adoption (the pair feared eviction by their landlord on the grounds that they were not related). Once past this point, having relegated the issue to one of private concern and

recognizing the private utility of its proposed decision, the court then reaches the point where it must come to grips with the fact that a homosexual living arrangement, even if supported by an adoption decree, is not the type of "family" relationship which the law generally recognizes.

In order to rationalize the change in the traditional law of family relations it has just made in the name of "privacy", the court undertakes to discuss the nature of the family relationship itself and to justify its position on the grounds that times have changed. The court states that "nuclear family *arrangement* (emphasis mine) is no longer the only model of family life in America", and that the courts are free to recognize whatever "non-traditional [family] forms" they choose. The fact that the New York Legislature had never considered the issue of homosexual adoption, and that most states reject adoption for sexual purposes on public policy grounds, is simply ignored.

Although the court has now changed the public policy of New York concerning "the family" in a manner which is totally at odds with traditional notions of family life, it appears to state that to do otherwise would impose its view of the "proper" family form on society. See note 42 *infra*. In reality, however, the court has just done so anyway; for once all the justifications, legal or otherwise, for the decision have been stated, the court's own view of the "proper" family form is stated very clearly. Its definition of a "family" for public policy purposes is contained in the following statement: "the best description of a family is a continuing relationship of love and care, and an assumption of responsibility for some other person."

While one may choose to agree or disagree with either the definition of "family" chosen or the result in the case (i.e. the legality of the adoption at issue), neither of those points is relevant to the point made above. The real issue from a policy perspective is that courts, under the rubric of defending the right to privacy, are busily writing their own views of what is, or is not, a "family" into the law of the land. Past experience has shown that legislative attempts to make the law reflect a more traditional view of family life will meet with both political and judicial opposition, see sources cited at notes 2, 19, and 42.

Since the entire process is incremental, such decisions have a long-term effect on the development of two important branches of legal principle. First, they legitimate the process by which courts become institutions with the power to define fundamental social concepts such as "family". In a representative democracy, this is a "power" or procedural question of great importance, especially when the court is not subject to the controls inherent in the electoral process. (*e.g.*, life-tenured federal judges, and state judges appointed for long terms without electoral supervision) Second, an important legal term, "family", is robbed of its fixed meaning.

For purposes of present law and future policy development, the lack of a fixed meaning for such an important term as "family" violates the cardinal principle that the law must be certain, and capable of being clearly understood by those who must implement or obey it. On a more practical level, the lack of a clear definition of "family" already makes it virtually impossible to devise strategies for encouraging nuclear or extended "family" life along the lines of the traditional model. Examination of The *Report "Listening to American Families"* (White House Conference on Families, October, 1980), cited at note 1 *supra*, discloses some of the difficulties which arise when no fixed definition of the term can be agreed upon.

17. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Brown v. Board of Education*, 347 U.S. 483, . . .n. 11 (1954).

18. Murdock, *supra* note 3 at 9-10, *also quoted in* Carlson, *supra* note 10 at 43.

19. *Compare, e.g.*, 42 U.S.C. 300a *et seq.* (Public Health Services Act, Title X) (contraception and teenage pregnancy) and *Planned Parenthood Federation of America, Inc. v. Schweiker*, 559 F. Supp. 658 (D.D.C. 1983), *aff'd sub nom. Planned Parenthood of America, Inc. v. Heckler*, 712 F.2d 650, 660 (D.C. Cir. 1983) (confidentiality requirements as applied to parents) *with* 42 U.S.C. 300z, *et seq*, 300z(a)(10)(A), 300z-5(a)(22) (Public Health Service Act, Title XX) (Adolescent Family Life Program) (requiring parental involvement and consent) and *Kendrick v. Heckler*, Civ. No. 83-3175 (D. D.C.) (pending) (constitutionality of

Adolescent Family Life Program). *See also Akron v. Akron Center for Reproductive Health,* — U.S. —, 103 S.Ct. 2481, 76 L.Ed.2d 687, 701 n.10, 708-710 nn.29-31, 728-729 & n. 12 (1983) (majority opinion per Powell, Jr. and dissent per O'Connor, J.) (abortions may be performed on immature minors without parental notice or consent upon the order of a court notwithstanding provisions of Ohio Juvenile Court statutes and rules requiring that parents be notified of any proceeding involving the interests of their children); *Baird v. Bellotti,* 450 F.Supp. 997, 1001 (D. Mass. 1978) *aff'd sub nom. Bellotti v. Baird* (II), 443 U.S. 622 (1979) (parents with strong religious views opposed to abortion should not be informed of the fact that their minor daughter is to have an abortion performed upon her because their reaction might not be in her best interests).

20. The degree to which government policy affects the family is a matter of some debate, but the fact that there is some effect is not seriously disputed. Examination of particular policies will generally indicate the assumptions concerning family life and relationships upon which the policies are based. In *Re Rose Child Dependency Case,* 161 Pa. Super. 204, 208, 54 A.2d 297 (1947), for example, the court discussed the policy behind involuntary deprivation of child custody for neglect and stated:

> It is a serious matter for the long arm of the state to reach into a home and snatch a child from its mother. It is a power which a government dedicated to freedom for the individual should exercise with extreme care, and only where the evidence clearly establishes its necessity . . . Under our system of government children are not the property of the state to be reared only where and under such conditons as officials deem best. . .
>
> The power of the juvenile court is not to adjudicate what is for the best interests of a child, but to adjudicate whether or not the child is neglected.

In re Rinker, 117 A.2d 780 (Pa. Super. 1955). *Accord Petition of Kauch,* 358 Mass. 327, 264 N.E.2d 371 (1970).

21. *See* E. Erikson, "Ontogeny of Ritualization" in Lowenstein, *Psychoanalysis — A General Psychology — Essays in Honor of Heinz Hartman* (1966) at 603, in L.L. Fuller, *Human Interaction and the Law,* 14 American J. of Jurisprudence 1 (1969).

22. References to "American law" in general should be understood as references to the laws of the several states unless otherwise indicated. The states have primary responsibility for the protection and preservation of family interests, *compare, e.g.,* U.S. Const. Amends. I, IX, X *with e.g.,* Ohio Rev. Code, Title 31, and it is only in recent years that the federal government's policies have begun to supplement, see, e.g., Ohio Rev. Code ch. 3115 (reciprocal child support), and, in some cases, intrude upon, *see, e.g., Planned Parenthood Federation of America, Inc. v. Schweiker,* 559 F. supp. 658 (D.D.C. 1983), *aff'd sub nom. Planned Parenthood of America, Inc. v. Heckler,* 712 F.2d 650, 660 (D.C. Cir. 1983) (confidentiality requirements of Title X as applied to parents of minor children receiving government funded contraceptive services and related sex-education programs), this traditional state function.

23. *See, e.g., Smith v. Organization of Foster Families,* 431 U.S. 816 (1977); *May v. Anderson,* 345 U.S. 528 (1953); *Benn v. Timmons,* 345 So.2d 388, 389 (Fla. App. 1977) ("a natural, Godgiven right"); *New Hampshire v. Robert H.,* 118 N.H. 713, 393 A.2d 1387 (1978).

24. *See, e.g., Moore v. City of East Cleveland,* 431 U.S. 494 (1977) (attempt by city to ban extended family living groups); *Wisconsin v. Yoder,* 406 U.S. 205 (1972) (education). *Cf., Quilloin v. Wolcott,* 434 U.S. 245 (1977) (adoption).

25. *See, e.g., Prince v. Massachusetts,* 321 U.S. 158 (1944) (child labor). *See generally, Thomas, Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives,* 50 N.C.L.Rev. 293 (1972); *Note, State Instrusion into Family Affairs: Justifications and Limitations,* 26 Stan. L. Rev. 1383 (1974).

26. Compare, for example, the divergent views of the federal government's attempts to limit the growing number of teenage pregnancies. The family planning provisions of Title X of the Public Health Service Act, 42 U.S.C. § 300a, et. seq. emphasize the provision of information on contraception and abortion to teenagers. The underlying assumption seems to be that government policies have little, if any, practical positive or negative effect on the rate of adolescent sexual activity, and that the best way to minimize unwanted teenage pregnancies is to maximize their access to birth control and abortion information and services. *See Planned Parenthood of America, Inc. v. Heckler, supra* note 18, 666 & n.13 (D.C. Cir. 1983). The provisions of Title XX, on the other hand, appear to proceed from the opposite assumption: that government should assist in the development of programs for teenagers which will dissuade them from early sexual activity and abortion, and that it is possible for government to encourage such activity if it restricts its efforts to the provision of birth control devices and information, and referral for abortion in an alledgedly "value neutral" setting. See Senate Report No. 97-161, 97th Congress, 1st Sess., July 21, 1981 at 4-9. *See also* Memorandum of Points and Authorities in Support of Defendant-Intervenors' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, *Kendrick v. Heckler, supra* note 7.

27. L.L. Fuller, *supra* note 20 at 34.

28. Caplow, *The Loco Parent: Federal Policy and Family Life,* 1976 B.Y.U.L. Rev. 709, 712.

29. *See, e.g., Bellotti* v. Baird (II), 443 U.S. 622 (1979) (plurality opinion, per Powell, J.).

30. *See, e.g., Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 71 (1976) ("balancing" of relative spousal interests in the case where the wife/mother desires an abortion, but the husband/father refuses consent). In *Danforth,* the Supreme Court resolved the controversy in favor of the mother because, in its view, "[t]the obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weights in her favor." This is precisely the sort of "balancing" which is inappropriate for a federal court which purports to be deciding a case on constitutional grounds. The law governing the relationship of spouses *inter se* is governed by state law, see sources cited at note 22 *supra,* not federal constitutional law, and the implication that the state may not legislate in the area to protect the rights of the husband is questionable. The Court's approach to the issue is best described by the "linear model" in the text above, for it assumes that the rights of the husband/father to the child are derived by grant from the state, and that to protect his rights to the child is, inevitably, to deprive the woman of hers).

31. *See generally,* Crampton Currie & Kay, *Conflict of Laws:* Cases-*Comments Questions* (West 3d ed. 1982?); H.H. Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience,* 68, Calif. L. Rev. 577 (1980).

32. *Wisconsin v. Yoder, supra,* at 233.

33. *See, e.g., Parham, v. J.R.* and *J.L.,* 442 U.S. 584 (1979); *Wisconsin v. Yoder, supra; Pierce v. Society of Sisters,* 268 U.S. s510 (1925).

34. *See, e.g., H.L. v. Matheson,* 450 U.S. 398 (1981); *Bellotti v. Baird* (II), 443 U.S. 622 (1979); *Bellotti v. Baird* (I), 428 U.S. 132 (1976); *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976); *In the Matter of Phillip B., a minor,* 92 Cal. App.3d 796, 156 Cal. Rptr. 48 (1979), *cert. den. sub. nom. Bothman v. Warren B.,* 445 U.S. 949 (1980).

35. Recent debates over the fitness of homosexuals to serve as custodial parents, and the ongoing debate over the access rights of adopted children and natural parents to adoption records are but two examples of the political sensitivity of these issues.

36. The first amendment questions inherent in the debate over the degree to which the government may involve itself in the moral development of children are some of the most common examples of difficult policy questions. See sources cited at notes 7, 18, and 35 supra.

37. *Compare, e.g. Akron v. Akron Center for Reproductive Health,* — U.S. —, 103 S. Ct. 2481, 76 L. Ed.2d 687, 710 n. 31 ad text accompanying note (1983) (indicating the Supreme Court's unwillingness to trust Ohio's juvenile courts to follow its instructions in abortion cases involving immature minors) *with, e.g., Baird v. Bellotti,* 450 F. Supp. 997, 1001 (D. Mass. 1978) *aff'd sub nom. Bellotti v. Baird* (II), 443 U.S. 622 (1979).

38. Blackstone, *Commentaries on the Law of England,* *446-459 (Lewis ed. 1902).

39. *See Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976). In legal terms, the concept is known as the "state action" rule. *See generally* Lockhart, Kamisar & Choper, *The American Constitution* (5th ed. West 1981) at 1044-1989.

40. Recognition of this lack of capacity can be found in statutes or constitutional provisions which limit or deny to minors the right to marry, *see, e.g.,* Mich. Comp. Laws Ann. 551.03; vote, *see, e.g.* U.S. Const. Amend, XXVI; contract, *see, e.g.,* Mich. Comp. Laws Ann. 750.137; or purchase liquor, *see, e.g.,* Mich. Comp. Laws Ann. 750.141.

41. *Compare, e.g.,* J. Holt, *Escape from Childhood* (1974) and P. Wald, *Making Sense Out of the Rights of Youth,* 4 Human Rights 13 (1974), with K. Kemmonton, *All Our Children* (Carnegie Council on Children, 1977) and R. Mnooken, "Children's Rights: Legal and Ethical Dilemmas," *The Transcript,* Summer, 1978 (Boalt Hall School of Law, University of California, Berkeley).

42. The most obvious of these issues is abortion, but it is by no means the only one. Interestingly, this argument can be used both to defend current policy formulations, *see, e.g.,* M.M. Cuomo, "Religious Belif and Public Morality: A Catholic Governor's Perspective" delivered to the Department of Theology, University of Notre Dame, South Bend, Indiana, September 13, 1984 (arguing that the Catholic view on abortion ought not to be "imposed" on society to replace the Supreme Court's view [which was also "imposed" on society] in the absence of a clear consensus in the political sphere), and to argue that the political sphere has no right to make any rules at all in areas deemed to be matters of "private" concern or choice, including such basic issues as the religious education and moral development of minor children. *See, generally,* Knudsen, *The Education of the Amish Child,* 62 Calif. L. Rev. 1506 (19794); *Note, Adjudication What Yoder Left Unresolved: Religious Rights for Minor Children After Danforth and Carey,* 1226 U. Pa. L. Rev. 1135 (1978). See also sources cited at notes 7, 9, 11, and 15 and accompanying text.

43. *See e.g.,* sources cited at note 3 *supra.*

44. *See, e.g., Akron v., Akron Center for Reproductive Health, supra; Planned Parenthood of Central Missouri v. Danforth, supra; In re Snyder, supra.*

45. *See., e.g., Bellotti v. Baird* (II), 443 U.S. 622 (1979); *United States v. University Hospital,* — F.2d —, No. 83-6343 (2d Cir. filed Feb. 23, 1984) (Baby Jane Doe); *In the Matter of Phillip B., a minor,* 92 Cal. App.3d 796, 156 Cal. Rptr. 48 (1979), *cert. den. sub. nom. Bothman v. Warren B.,* 445 U.S. 949 (1980). *Compare, Linn v. Linn,* 205 Neb. 218, 286 N.W.2d 765 (1980) ("best interests" standard is unconstitutionally vague without description of prohibited parental conduct); *Gonzalez v. Texas Dept. of Human Resources,* 581 S.W.2d 522 (Ct. Civ. App. 1979), *cert. den.* 445 904 (1980).