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The Family in Transition: From Griswold to Eisenstadt and Beyond

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Since the Industrial Revolution, the family has been slowly, yet consistently, casting off its ancient past, and in the process one of the last vestiges of the feudal world has been vanishing from the social order. That process approaches completion.[1] As it does, the hierarchical structure, through which family relations were organized and inequalities within families justified and sustained, erodes, and the inexorable ties that defined the rights and responsibilities of family relationships vanish. Indeed, the old inequalities that defined women and children—as a matter of nature's inevitabilities—as essentially inferior to men, are being eroded. In their place other inequalities emerge. The law and the larger society increasingly view people within families as equal, autonomous individuals who can choose their partners and the terms of their relationships. But as the history of the marketplace in the past century and a half testifies, that view does not guarantee the equality it assumes as a matter of moral belief.

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Parts of this article will be elaborated in a book now in preparation, tentatively entitled *The Law and Reproductive Technology,* scheduled to be published by the New York University Press in 1996.

1. As this article describes, the sense of the person within families has been almost totally altered within the past few hundred years. The concrete social correlates of that shift have become visible only within recent decades. That the shift will be completed all at once seems unlikely, but that it will occur seems quite likely. Probably, changes in the family and in the law's response to the family will continue to occur and to be followed by a movement back toward older forms, to be followed in turn by more change. *See* Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood,* 40 UCLA L. REV. 637, 637-42 (1993) (describing the judiciary's response to changes in traditional conceptions of the family).

As in the society more generally, dramatic shifts in belief tend to integrate slowly into the family unit, but once such changes occur, there may be no going back. As the anthropologist and indologist Louis Dumont wrote about the development of individualism in the West:

> From a certain moment in Western history, men saw themselves as individuals. It matters little that this did not occur all at once, although one may hope to trace the genesis of man as an individual starting from man as a collective being in the traditional type of society. But men did not cease to be social beings the day they conceived themselves in a contrary fashion . . . .

LOUIS DUMONT, HOMO HIERARCHICUS 237 (Mark R. Sainsbury trans., 1970).

Thus, the society's understanding of people within families is merging with its understanding of people in the marketplace. And in that marketplace, of course, an egalitarian ideology[2] is, and can only be, actualized to the extent that people *are* the equal negotiating partners the ideology assumes. The inequalities of the market have always been silent inequalities in comparison to the inequalities of the home.[3] It is those silent inequalities that now begin to dominate the domestic sphere, replacing the ancient, more transparent inequalities grounded in natural and eternal difference.

This article focuses on the shift from a world in which domestic relations are founded in a hierarchical ideology that manifests natural differences in the actual relationships between people to a world in which domestic relations are founded in an egalitarian ideology that presumes the autonomy of the individual within a world of contract. Part I of this article describes the American family just before a set of remarkable changes in the law's response to the family, beginning about thirty years ago, acknowledged and furthered the transformation of the American family into an association of separate individuals. This Part explains the roots of the traditional family by exploring the ideological and social contours of the medieval universe from which the family, almost alone and almost intact, emerged into the twentieth century.

Part II examines the moral dimensions[4] of these changes for the society by comparing three landmark cases decided by the Supreme Court over more than half a century. The first, *Lochner v. New York*,[5] a 1905 decision invalidating a state labor law, illustrates the assumptions with which nine-

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2. Throughout this article, the term "ideology" means the pervasive system of underlying, often unarticulated beliefs in which people think about and anchor their lives. The definition follows the meaning of "ideology" in the work of Louis Dumont, who explained:

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

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

3. The difference noted here parallels that described by Henri Lefebvre between the opacity of modern ideologies and the comparative transparency of traditional ideologies. *See* HENRI LEFEBVRE, EVERYDAY LIFE IN THE MODERN WORLD 24-25 (Sacha Rabinowitz trans., 1971) (explaining that modern ideologies are comparatively opaque and not easily discernible, but traditional ideologies more clearly reflect the social order).

4. I am indebted to my colleague Professor Wendy Rogovin with whom I teach a course called *The Moral Dimensions of the Law* and with whom some of the ideas in this article were first discussed and analyzed.

5. 198 U.S. 45 (1905).

teenth century liberalism approached the market. The second, *Griswold v. Connecticut,*[6] which invalidated a state birth control law in 1965, distances itself from *Lochner* by predicating a constitutional right to privacy on the separateness and moral centrality of the domestic sphere. The third, *Eisenstadt v. Baird,*[7] decided in 1973, transferred the privacy right articulated in *Griswold* from the family as a unit to the individuals who compose that unit. *Eisenstadt,* in which the Court relied expressly on the right to privacy delineated in *Griswold,* assumed a view of the family not unlike the view of the market assumed by the Court seventy years earlier in *Lochner.*

This article will argue that the decision in *Eisenstadt* is singularly important.[8] The decision is important not because it initiated changes in the form of family, nor because it offered an irresistible constitutional precedent that the Court followed unhesitatingly in later decisions.[9] Neither claim would be true. The decade preceding and the decades following *Eisenstadt* are marked by remarkable changes in the pattern of family life and in the law's response to the family.[10] *Eisenstadt* is in large part an instance of those changes, not their cause. As a constitutional statement, the decision is badly reasoned[11] and has been limited, rather than ex-

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6. 381 U.S. 479 (1965).

7. 405 U.S. 438 (1972).

8. Certainly, Roe v. Wade, 410 U.S. 113 (1973), in which the Court granted women a limited right to abort unwanted pregnancies, also relied on a right to privacy and is far more often noted and more controversial than *Eisenstadt.* However, *Roe* did not and could not rely as wholeheartedly on claims of unfettered individualism as did *Eisenstadt* because it is not possible when considering abortion to avoid questions about the moral status and legal claims of the fetus. Thus, the ideological underpinnings of *Roe* and the other abortion cases are more complicated than those of *Eisenstadt* and therefore serve less well as texts from which to analyze and understand the move toward individualism within the family. *See* Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases,* 1973 SUP. CT. REV. 159, 167-85 (noting that the abortion cases involve the unique issue of the personhood of the fetus). Among others, the so-called "privacy cases" decided in the years just after *Eisenstadt* and *Roe* include Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (holding unconstitutional a New York statute forbidding nonpharmaceutical sale of contraceptives to minors whether married or not) and Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (precluding states from giving a woman's husband power to veto her abortion decision).

9. Even in Roe v. Wade, 410 U.S. 113 (1973), the Court did not rely, more than by way of passing mention, on either *Griswold* or *Eisenstadt. Griswold* would have provided a problematic precedent because of the stress placed on the "marital couple" as the subject to which the right of privacy attached. *See infra* note 14 and accompanying text (discussing the absence of an individual privacy notion in *Griswold*).

10. *See infra* Part I.C.2.

11. *See* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests,* 81 MICH. L. REV. 463, 528 (1983) (describing *Eisenstadt* as having "generated more confusion about sexual privacy for the unmarried than any other Supreme Court opinion, largely because [Justice Brennan for the Court] did not make it clear whether *Eisenstadt* extended to single persons the associational intimacy implicit in *Griswold*'s recognition of the marriage relationship, or merely the right of access to contraceptives" (footnote omitted)).

panded, by subsequent cases.[12] Instead, *Eisenstadt* is important because the Court's decision indicates forcefully the shape and the scope of the ideological shift that has undergirded changes in the American family and in American family law during the past several decades.[13]

Eisenstadt, like *Griswold* seven years earlier, posited a "right to privacy" as the constitutional foundation for protection of relations connected with "home" and "family"—rather than with "work" and the "market." In each case, the Court invoked a "right to privacy" not expressly mentioned in the Constitution. Yet *Eisenstadt,* like *Lochner* over seventy years earlier—and unlike *Griswold*[14]—expressed and extended to individual family members the ideology of autonomous individualism that has been the philosophical cornerstone of the social order in the West, at least since Adam Smith[15] and, in many regards, since Martin Luther more than two centuries before. And thus, the right to privacy protected in *Eisenstadt* is unlike the right to privacy protected in *Griswold.* In *Griswold,* the right to privacy attached not to individuals, but to the family unit as a whole. In this regard, *Eisenstadt,* but not necessarily *Griswold,* represents a link in a chain of changes that goes back to the decline and transformation of the feudal social order between the fourteenth and eighteenth centuries.[16]

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12. An underlying theme of the present article is that, given the broad social ambivalence that surrounds the transition to individualism, such shifts back and forth are almost inevitable. *See infra* note 239 and accompanying text.

Eisenstadt's reach was indeed limited significantly by subsequent Supreme Court cases. Even *Carey* did not expressly extend to minors a constitutional right to procreate. Although decided on the ground that the statute infringed the minors' constitutional right to privacy, the opinion focused on the "fact" that forbidding minors access to contraceptives would not curtail premarital sex. The Court, concerned that the statute led to an increased risk of "unwanted pregnancy and venereal disease," did not stress the right of minors to procreate. *Carey,* 431 U.S. at 715 (Stevens, J., concurring in part); *see also* Bowers v. Hardwick, 478 U.S. 186, 195 (1986) (upholding Georgia sodomy statute and refusing to state that homosexuals have a fundamental right to engage in sodomy). Thus, *Eisenstadt* has become less important as a direct step toward increasingly broad privacy and liberty rights in the context of "lifestyle" choices than it might have seemed when it was decided. It remains enormously important, however, for its distinction between individual and family rights.

13. Later ambivalence about and express disapproval of *Eisenstadt* by members of the Court and by commentators suggest the magnitude of the change involved. *See infra* note 239 and accompanying text.

14. The subtext of *Griswold* may be more like *Eisenstadt* and *Lochner* in this regard than seems true from a reading of *Griswold's* express language; *see infra* Part II.A (discussing subtext of *Griswold*). The right to privacy expressly granted in *Griswold* attaches to the family, however, and not to the individual.

15. *See generally* ADAM SMITH, THE WEALTH OF NATIONS (R.D. Irwin 1963) (1776).

16. *See* David Herlihy, *General Introduction* to THE HISTORY OF FEUDALISM xi (David Herlihy ed., 1970) (describing the early and central Middle Ages as lasting from 750 until 1300 and describing the demise or transformation of feudal forms as occurring between the fourteenth and eighteenth centuries, a period that Herlihy describes as the late medieval and early modern age).

Richard Hixson and Raymond Williams have both noted and commented upon the connection in earlier centuries between "privacy" and the values of a "decent and dignified" life that included the "privacy of [a person's] family and friends." RICHARD F. HIXSON,

Finally, Part III considers the moral implications of the transformation of the American family in recent decades—a transformation represented by the differences between the Court's message in *Griswold* and its message in *Eisenstadt*—by analyzing the consequences for relationships, and responsibility within and toward those relationships, in a world in which privacy attaches only to the individual as such.

I. STATUS AND PRIVACY: THE FAMILY AND ITS FEUDAL ROOTS

Until recently, the family was understood as separate from the world of work in almost every regard. This separation was reflected in the legal system that regulated the family through a distinct set of rules, which contrasted—as "home" contrasted with "work"—with the rules that regulated the marketplace. The legal system recognized the family as a complete, autonomous unit and intervened only in the most extreme cases.[17] Thus, the law recognized the privacy of family matters. The society and the law understood the family as a universe of private interactions grounded in natural and supernatural truths. On those truths were predicated the hierarchical structure of the family unit as well as the enduring inevitability of family relationship. The family was almost unique within the society.[18] However, in the much older social order of feudal Europe, most of society was understood in similar terms. Society itself was viewed as a hierarchical whole, anchored in religious and natural truth, and was valued as such.

A. THE AMERICAN FAMILY

In the early 1960s, before the social and legal changes described in this article became manifest, the anthropologist David Schneider characterized the American family.[19] He explained:

> The set of features which distinguishes home and work is one expression of the general paradigm for how kinship relations should be con-

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PRIVACY IN A PUBLIC SOCIETY 8 (1987) (quoting RAYMOND WILLIAMS, KEYWORDS 203 (1976)). Notably, early Americans followed a trend of abandoning communal life and favoring privacy in the home. *Id.* at 9-10.

17. This is not to say that the law did not, in fact, have a great deal to do with defining and regulating families. Frances Olsen makes this point clearly when she argues that "[s]tate intervention in the family is an ideological, not an analytic concept." Frances Olsen, *The Myth of State Intervention in the Family, in* FAMILY MATTERS 277, 281 (Martha Minow ed., 1993). The common law recognition of "family autonomy," however, acknowledged the family as a *whole,* separate from the world of work and money, which for the most part—given the intensity and generality of the ideology that defined family—would function as it was expected to function.

18. *See* David M. Schneider, *Kinship, Nationality and Religion in American Culture: Toward a Definition of Kinship, in* SYMBOLIC ANTHROPOLOGY 63, 64-69 (Janet L. Dolgin et al. eds., 1977) (describing similarities across American cultures in ideologies of family, religion, and nationality).

19. DAVID M. SCHNEIDER, AMERICAN KINSHIP 48-49 (1968).

> ducted and to what end. These features form a closely interconnected cluster.
>
> The contrast between love and money in American culture summarizes this cluster of distinctive features. Money is material, it is power, it is impersonal and unqualified by considerations of sentiment or morality. Relations of work, centering on money, are of a temporary, transitory sort. They are contingent, depending entirely on the specific goal—money.
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> . . . [T]he opposition between money and love is not simply that money is material and love is not. Money is material, but love is *spiritual*. The spiritual quality of love is closely linked with the fact that in love it is personal considerations which are the crucial ones. Personal considerations are a question of who it is, not of how well they perform their task or how efficient they are. Love is a relationship between persons. Morality and sentiment in turn are the essence of the spiritual quality of love, for they transcend small and petty considerations of private gain or advantage or mere gratification.[20]

Schneider described the American family as a unit of love, characterized by "enduring, diffuse solidarity" and "defined in terms of sexual intercourse as a reproductive act, stressing the sexual relationship between husband and wife and the biological identity between parent and child, and between siblings."[21] Schneider described the symbol of love as bridging two culturally distinguished domains. He described these domains of kinship as those that involve relationships of "substance" (e.g., blood, genes) and those that involve a certain kind of "code for conduct," the conduct of kin toward and among each other.[22]

Thus, Schneider envisioned the American family as a special, almost sacred domain, distinct in space and thought from work—from the "office" and the market it represents. Schneider portrayed the family as a domain in which relationships are ordered, enduring, and inexorable. In contrast, at work, people can at least in theory negotiate the terms of their own realities and relationships. A bargain is *intended* to last only as long as the parties plan. Not so at home. Relationships endure, and the terms of those

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20. *Id.* at 52.

21. *Id.* at 51-52.

22. *Id.* at 52. Schneider captured the essence of the American family at mid-century. Yet today, 25 years after its publication, Schneider's descriptions tend to sound old-fashioned. That is not an accident. In that same period, the family had begun to merge in significant and obvious ways with the world of work and money and is significantly different, though not unrecognizable, from the family Schneider described.

In fact, this article argues that Schneider's portrait of the American family captured much more than its essence during a certain year or a certain decade. *See infra* text accompanying note 224. Rather, Schneider described the family as it had existed in the West for many hundreds of years. The changes that seem so well-entrenched today, and with which this article is concerned, were not clearly established or widely recognized in the society or in its legal system until the late 1960s, after Schneider conducted his research.

relationships are not freely negotiable. Mothers are understood as mothers, fathers as fathers, and children as children because nature harmonizes with history to make them so. As home stands to love, so work stands to money.

The essential difference between the two domains—the domain of home and the domain of work—is captured and placed in historical context by Sir Henry Maine's distinction between "status" and "contract."[23] Maine wrote:

> The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account. . . . Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals.[24]

Maine continued:

> All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*.[25]

The differences Maine described between a universe that predominantly reflects status and one that predominantly reflects contract are represented in the contemporary world in the difference between home and work. In a world of status, relationships like the rights and duties that

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23. HENRY J.S. MAINE, ANCIENT LAW 100 (J.M. Dent & Sons Ltd. 1917) (1861). In citing and quoting Maine, this article does not endorse his specific argument that modern rights and duties developed from the rights and duties of kinship relations. Rather, Maine's distinction between status and contract is being used here to invoke a general understanding of the development of individualism. *See* Janet L. Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 BUFF. L. REV. 516, 519 & n.12 (1990) (describing academic debate over validity of Maine's ethnographic assumptions).

24. MAINE, *supra* note 23, at 99.

25. *Id.* at 100.

attend them are grounded in inexorable truths (e.g., the truths of biological process). Within a universe of status, the obligations and rights that define relationships flow automatically and inevitably from the fact of the relationship. Thus, for instance, parents are expected to love and provide for their children, not because they have agreed to do so, but simply because they are parents.[26] In contrast, in the world of contract, individuals are putatively equal[27] and, as such, can design or at least negotiate the terms of their own interactions. In theory, in such a universe nothing is inevitable.

In the contemporary world, the sort of group Schneider describes in analyzing the American family—a group in which the terms of relationship are not generally open to selection and negotiation—is almost unique. But in an earlier epoch, most relationships were determined by natural or sacred truths.

B. STATUS IN MEDIEVAL EUROPE

Henry Maine erred in asserting that the rights and duties of contract developed directly from the rights and duties of medieval kinship.[28] Maine's characterization of a world defined in terms of an ideology[29] of status, however, describes much of the world of feudal Europe as well as a few institutions in contemporary society, such as the family, which survived the momentous shifts that affected most of the social order as feudal forms eroded.

1. The Nature of Feudal Hierarchy

The medieval world was organized around two interconnected hierarchies:[30] that of the laity, which culminated in the feudal kings,[31] and that of the Catholic Church.[32] At the heart of the medieval system of ideas was

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26. *See* Dolgin, *supra* note 23, at 517-20 (discussing Maine's distinction between status and contract).

27. In fact, the equality that is supposed to define each individual in a world of contract seems always to exclude certain people from its embrace—those people (e.g., women, blacks, and children) who are not defined by the dominant society as full human beings. *See id.* at 518 & n.8 (noting the limitations on equality that Maine argued increasingly applied to women).

28. *See id.* at 519 n.12.

29. *See supra* note 2 (defining "ideology").

30. The postulation of two hierarchies is in no way intended to gainsay Georges Duby's brilliant description and analysis of the three orders of the medieval period: the order of the Church, the order of the nobility, and the order of laborers. GEORGES DUBY, THE THREE ORDERS 13, 44 (Arthur Goldhammer trans., 1980).

31. The term feudal aristocracy is not meant necessarily to imply a real nobility in the sense of a legal class based on inherited title. That sort of nobility appears not to have developed in Europe until quite late in the feudal period. 2 MARC BLOCH, FEUDAL SOCIETY 283-84 (L.A. Manyon trans., 1974).

32. *Id.* at 346. In fact, distinctions between the religious hierarchy and the aristocracy were blurred. Bloch wrote: "A whole population of 'tonsured persons,' whose status re-

the notion of hierarchy and the principle of inequality.[33] The Church and the nobility, the latter including titular and generally weak kings quite unlike those who emerged later in European history, were antagonists and compatriots. The bishop and the noble each viewed the other as a potential usurper of his own rightful power.[34] Yet the two groups shared a vision of reality that ultimately united them in opposition to the shifts that shook feudal Europe at the end of the medieval period.

Both groups relied on, and were organized into, a hierarchical system grounded respectively in sacred and natural fact. Thus, the medieval historian Georges Duby refers to the "principle of necessary inequality" that organized the feudal world, and argues that the understanding and structure of the feudal world developed out of

> the conjunction of two kinds of dissimilarity, that instituted by the *ordo*—there were the priests and the others—conjoined with that instituted by *natura*—there were nobles and serfs. The source of disorder was not that nature changed, but that the order was breached. This occurred, for instance, when 'rustics' were included in the deliberations of the peace assemblies (or when a man not born into the nobility acceded to the episcopal dignity), when nobles were required to pray, or *oratores* to fight.[35]

Those who labored, called variously peasants or serfs, supported and were exploited by the nobles and the clergy. Their exploitation, however, was not understood as *unnecessarily* exploitative.[36] Rather, as described by Adalbero, bishop of Laon and member of a tenth century noble family, oppression was hereditary.[37] Adalbero described peasants as those who were fit by nature to serve. "[T]heir blood was not the blood of kings, and because they were not ordained, [they] were compelled to alienate their

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mained ill-defined, formed an indeterminate borderland on the frontiers of the two great groups." *Id.* at 345.

33. *See* DUBY, *supra* note 30, at 57-60 (describing the social structure, culture, and politics of medieval France, especially northern France).

34. *Id.* at 58.

35. *Id.* at 59.

36. Anthropologists Louis Dumont and Steven A. Barnett characterize the ideology of caste India in similar terms. *See, e.g.*, Stephen A. Barnett, *Approaches to Changes in Caste Ideology in South India, in* ESSAYS ON SOUTH INDIA 149, 158-59 (Burton Stein ed., 1976); DUMONT, *supra* note 2, at 4. Each argues that in traditional caste India, hierarchy, not equality, was *valued*. So, they argue, a basic difference between traditional caste India and the modern West is that in India inequalities reflect the dominant system of beliefs—the way people thought their world *was and should be*. In the West, however, inequalities (such as racism) conflict with an egalitarian ideology and are thus constantly being explained away. *See also* Louis Dumont, *Caste, Racism and 'Stratification': Reflections of a Social Anthropologist, in* SYMBOLIC ANTHROPOLOGY, *supra* note 18, at 72, 83-89 [hereinafter Dumont, *Caste*] (comparing racism in the West with caste hierarchy in India).

37. DUBY, *supra* note 30, at 13.

strength in the service of others."[38] More generally, within the feudal hierarchy, people categorized variously as nobles or serfs, or at some position in between, occupied the status they occupied by virtue of birth, "by nature."[39] Hierarchy was a fact—indeed *the* pre-eminent fact—of life, both everyday and sacred. Like the roles that people in the hierarchy played and the statuses they enjoyed or suffered, the fact of hierarchy was considered to be as inevitable as the fact of social life itself.

An additional, basic aspect of hierarchy in the medieval world, and one that differentiates feudal hierarchy from inequalities in the contemporary Western world, was the understanding of hierarchy as a structure that included reciprocity and mutuality at its center.[40] Medieval hierarchy (in both its religious and secular forms) constituted a structured *unity*. According to Georges Duby, "[t]he unity of human society . . . was held to derive, as did the health of the body and the prosperity of the household, from reciprocal giving."[41] The whole was defined by a notion of "mutual interchange."[42] When Charlemagne ordered that "every man shall keep to his own life's purpose and his own profession, *unanimously*,"[43] he captured the fact of hierarchy and the reciprocity embedded in it.

Christian metaphors spawned and nourished the mutuality of medieval hierarchy. Duby explains:

> To make discipline bearable, and inequality tolerable, it was prudent to accredit the notion that in Christian society—much as between parents and children, old and young, or as in any community, in monastery and palace alike, in villages as among soldiers—hearts were bound by ties of affection.[44]

In metaphors characterizing the unity and reciprocity of social and ecclesiastical hierarchy in the medieval world, references to the corporal unity of Christ and his community were transformed into references to the domestic unit and relations within it.

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38. *Id.* at 59.

39. *Id.* The description should not be read to suggest that, in fact, status positions in the feudal period were always inherited, but only that they were so understood. The lines of privilege were quite mobile with people moving in and out of status positions. At least until the twelfth century, heredity did not necessarily curtail the possibility of moving into a status position different from that of one's ancestors. *See* BLOCH, *supra* note 31, at 320 (placing the institutionalization of knighthood as a matter of hereditary privilege only sometime between 1130 and 1250). From the start of the feudal period, however, the *understanding* of the world was hierarchical, and the hierarchies that defined life were viewed as essentially inexorable. That is to say, hierarchy was *valued*.

40. DUBY, *supra* note 30, at 59, 70-75.

41. *Id.* at 71.

42. *Id.*

43. CAPITULARIA REGUM FRANCORUM (A. Boretins & V. Krause eds., 1883-97), *cited in* DUBY, *supra* note 30, at 363 n.9.

44. DUBY, *supra* note 30, at 70.

The medieval family was a hierarchical unit, defined by respect and deference.[45] The family metaphor was easily applicable to the larger society because the society as a whole was understood as a hierarchical unit, each part of which could be understood only in light of the larger whole.[46] In the medieval world, no unit, no person could be understood alone.

2. "Persons," "Groups," and Privacy in the Feudal Period

For everyone in the feudal world, the hierarchical character of social life precluded individuality and the sort of privacy (understood variously as a fact and as a right) that was later attached to the individual in the West. Certainly, forms of "privacy" existed in the feudal period, but that privacy was significantly different from the individual privacy that developed later in Europe and in America.

Privacy, like almost everything else in the feudal world, was defined and regulated by the reality of a hierarchical universe. *Within* any unit of that hierarchy (e.g., a feudal manor, a *domus,* or a family residence), relations were "private" in the sense that they were not, or were only minimally, regulated by outside powers, including public law. Indeed, one of the key developments in the second part of the feudal period was the "privatization of power." This so-called "feudal revolution" involved a dramatic evisceration of public law and public power.[47] It did not, however, involve the sort of autonomous individuality that provided the ideological context for the development of privacy (including, in particular, the development of private property) that occurred in nineteenth century England.

The individual person[48] in feudal Europe was never private, as presently understood. The person was always, and of necessity,[49] defined as *part of* some larger unit. Privacy attached to the *group* and not to the person. Within the society's hierarchically structured subgroups (e.g., domestic groups, however widely defined)[50] bonds of affection, trust, and intimacy,

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45. *See generally* 5 GEORGES DUBY, MEDIEVAL MARRIAGE (Elborg Forster trans., 1978).

46. Indeed, Henry Maine's largely discounted assertion that rights and powers in the world of contract largely developed from the status universe of the medieval family may have resulted from confusing power relations *within* feudal Europe, which did reflect the structure of the domestic unit, with power relations in later periods. *See supra* note 23 (citing Maine).

47. Georges Duby, *Private Power, Public Power, in* 2 A HISTORY OF PRIVATE LIFE 3, 3-8 (Philippe Aries & Georges Duby eds., 1988) (defining public and private life in the feudal age).

48. The term "individual person" or "person" is used to avoid any implication that the "person" being discussed resembles the "individual" of the West as defined by the French Revolution and the Industrial Revolution.

49. The assertion here is that individual privacy was an impossibility in a universe that did not recognize *individuals*. Obviously, people were seen as physically separate from one another, but each person was defined as separate only in the context of some larger hierarchically organized groups.

50. *See* DAVID HERLIHY, MEDIEVAL HOUSEHOLDS 34 (1985) (describing medieval Irish kindred as containing households numbering between 120 and 256 people); Charles de La

grounded in bonds of "blood," linked people together in unity. The unity, however, was a hierarchical unity. The word *privé* in courtly French referred to "the people and things included within the family circle . . . over which the master of the house exercised his power."[51] Thus, privacy in feudal Europe, like privacy in the modern world, could imply intimacy with those inside and distance from those outside. However, the locus for understanding intimacy and distance alike was not the person, but some hierarchically organized larger group.

The earliest emergence of modern understandings of privacy in the West signalled the transformation and demise of feudal society. The sort of privacy that is defined as an attribute and right of individuals came only after the almost total decline of feudal forms and developed along with the notion of equality as a social value beginning in the late eighteenth century. Indeed, the Industrial Revolution and the French Revolution depended on and encouraged the replacement of the notion of privilege with the notion of equality.[52]

Privacy in the modern sense involves defining the individual person apart from larger social forms. So, for instance, in feudal Europe, the person's relation to God was inevitably[53] mediated by an elaborate Church hierarchy; similarly, the person's relation to secular power[54] was mediated

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Ronciere, *Tuscan Notables on the Eve of the Renaissance, in* 2 A HISTORY OF PRIVATE LIFE, *supra* note 47, at 157, 161 (explaining that medieval households often included extended family groups including a couple, their children, unmarried as well as married sons with their wives, children, and ancestors). Households often included larger groups that came and departed such as familiars (probably blood relatives) and friends. The larger unit, what was called the *maisnie* (household) in medieval French might include scores of people. Georges Duby, *The Aristocratic Households of Feudal France, in* 2 A HISTORY OF PRIVATE LIFE, *supra* note 47, at 35, 63-64. Duby explains:

> What twelfth- and thirteenth-century familiars expected from their patron was in essence no different from what, according to one formulary, a Merovingian pledging himself to his lord had expected some five hundred years earlier: "Food and clothing (*victim et vestitum*), both for my back and for my bed, and shoes, thou shalt procure me, and all that I possess shall remain in thy power." Thus a man pledged himself (much as a monk made profession) in exchange for all that his body and soul might require.

Id. at 64.

51. Duby, *supra* note 47, at 6. Larger, harmonious private groups were formed in feudal France through the act of "commendatio." Commendatio involved an individual's pledging himself to a group leader and, thus, to all members of the leader's group. *Id.* at 8. Duby describes the relation that existed between member and leader as "a very powerful emotional bond." *Id.*

52. *See* R.H. TAWNEY, EQUALITY 91 (1964). As Tawney makes clear, the decline of privilege and the development of the notion of equality in the West should not be taken to imply that inequalities were wiped away, but only that the form and meaning of the inequalities that remained were quite different than those of earlier epochs.

53. Again, this argument is being made at the level of ideology. In fact, every society witnesses and supports various exceptions to its preferred and institutionalized forms.

54. The modern state had not yet developed in Europe.

by a complicated secular hierarchy composed of nobles and knights, serfs and kings. In the system of belief that undergirded feudal society, unmediated access to the king or to God could hardly be imagined.

The emergence of unmediated access to ruling powers—in the sociopolitical world with the establishment of nationalism and in the religious world with the establishment of Protestantism—provided a context within which nineteenth century individualism, along with the individual's right to privacy and to private property, could develop. Perhaps nowhere are the social implications, if not the history, of feudalism's decline more forcefully suggested than in George Bernard Shaw's *Saint Joan,* Shaw's play about Joan of Arc. The Earl of Warwick, Shaw's principal representative of feudalism's declining nobility, explained why it was imperative that Joan's voice be stilled. He said of Joan: "It is the protest of the individual soul against the interference of priest or peer between the private man and his God. I should call it Protestantism if I had to find a name for it."[55] In Shaw's presentation, Joan foreshadowed Protestantism one hundred years before Martin Luther by effecting a religious stance that afforded the individual direct access to God, thus precluding the mediation of the clerical hierarchy. Joan's relation to God was in that sense "private," and for that reason, could become widespread only centuries later.

C. MEDIEVAL FORMS IN THE MODERN FAMILY

1. Preservation of Medieval Forms in the Modern Family

The inexorable bonds of relationship that anchored medieval hierarchy and imbued it with meaning and power have largely evaporated. They have been replaced by other forms of connection in the contemporary West. Nothing at the level of beliefs or values[56] now precludes the individual

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55. GEORGE BERNARD SHAW, SAINT JOAN sc. 4 (Stanley Weintraub ed., Bobbs-Merrill 1971) (1924). Shaw elaborated on the theme of scene four in his long preface to the play. There he wrote:

> [Joan's] prayers were wonderful conversations with her three saints. Her piety seemed superhuman to the formally dutiful people whose religion was only a task to them. But when the Church was not offering her her favorite luxuries, but calling on her to accept its interpretation of God's will, and to sacrifice her own, she flatly refused, and made it clear that her notion of a Catholic Church was one in which the Pope was Pope Joan. How could the Church tolerate that, when it had just destroyed Hus, and had watched the career of Wycliffe with a growing anger that would have brought him, too, to the stake, had he not died a natural death before the wrath fell on him in his grave? Neither Hus nor Wycliffe was as bluntly defiant as Joan: both were reformers of the Church like Luther; whilst Joan, like Mrs. Eddy, was quite prepared to supersede St. Peter as the rock on which the Church was built, and, like Mahomet, was always ready with a private revelation from God to settle every question and fit every occasion.

Id. at 293.

56. That is to say, there is no ideological reason that precludes direct connection between the individual and sources of ultimate power. *See supra* note 2 (defining "ideology").

from approaching forms of ultimate power (whether or not those are still defined as "God" and "king") without mediators.[57]

Connection is no longer inevitably embedded in community. Rather, the ideology of autonomous individuality defines people as free to select their own partners, design their own communities, and act out their own dramas. The most obvious arena for this individualistic focus is the world of work, which in Maine's phrase, is a universe of contract.[58] There, the connections between people are neither enduring nor deeply rooted. The complete person is, by definition, the person entitled to negotiate and enter contracts. As contracts begin and end, so do the connections they effect. Contractual links are generally neither enduring nor solidaristic.[59] Such connections do not, and are not expected to, evolve into ties of ongoing affection. With these new forms of interaction comes a new form of privacy. This is the privacy of the individual apart from any groups to which he or she may belong. It is also the privacy of absolute aloneness.

Until recently, in the modern world, the family almost alone stood apart from the encompassing ideology of the market, which stresses autonomous individuality. The American legal system recognized the family's singularity and continued largely to define and regulate the family as a realm apart from the world of business with its attendant laws of contract and tort. Thus, for hundreds of years after the general demise of feudal forms in Western society and Western law, family law continued to demarcate and protect the family as a special, even sacred, domain of life, almost uniquely unconnected to the definitions of person and group in the market.

Some scholars think the family became a private institution only during the nineteenth century.[60] More accurately, the character of the family became noticeably unique by the late eighteenth century when other social institutions had shed their medieval roots;[61] only then, therefore, did family privacy mark the family as distinct. But certainly, family privacy was recognized and extolled long before that time.[62] Not by accident was

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57. Obviously, there may be a myriad of practical reasons that make it impossible or unlikely that any individual could avoid mediators in approaching "god" or "king." However, it is now *imaginable* that such mediation be eliminated. Catholicism poses a contemporary exception of sorts because Catholicism has, at least in part, preserved feudal forms of hierarchy.

58. MAINE, *supra* note 23, at 99.

59. *See supra* notes 19-22 and accompanying text (discussing David Schneider's description of the American family as a unit of "enduring, diffuse solidarity").

60. Anne C. Dailey, *Constitutional Privacy and the Just Family,* 67 TUL. L. REV. 955 (1993) (citing, among others, MICHAEL GROSSBERG, GOVERNING THE HEARTH 4-5 (1985)); Ellen C. DuBois, *The Radicalism of the Woman Suffrage Movement: Notes Toward the Reconstruction of Nineteenth-Century Feminism,* 3 FEMINIST STUD. 63, 64 (1975); *see also* JEAN B. ELSHTAIN, PUBLIC MAN, PRIVATE WOMAN 106-08 (1981).

61. *See* Francis E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform,* 96 HARV. L. REV. 1497, 1516 (1983).

62. *See* Duby, *supra* note 47, at 6 and accompanying text.

privacy so often described and praised with reference to the house as "castle,"[63] and therefore sacrosanct. In 1761, James Otis, a Boston lawyer and leader of the American Revolution, declared: "Now one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet he is as well guarded as a prince in his castle."[64] The family can thus be understood as one of the last vestiges of a world in which the unit of social value was not the individual but the larger, hierarchical whole represented as a private and complete whole through reference to the medieval castle.

Obviously, the foregoing description is not intended to be a *history* of the family in the West and is hardly intended to suggest that nothing happened to the Western family between the seventeenth and mid-twentieth century. Much happened. Significant shifts in household composition, as well as shifts in the roles and occupations deemed appropriate to various family members,[65] occurred between the seventeenth and nineteenth centuries.[66] However, throughout this long period, replete with transformations in household and domestic patterns, the family was consistently understood as a unit of intimate relationships among people tied together by the laws of nature and God. The family was transformed, but it remained the "family."[67]

Indeed, the family—practically alone among Western institutions, and despite significant transformations during the course of the past several

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63. Within a society that assumed a patriarchal family, the phrase "a man's house is his castle" included the man's wife and children and others residing in the domestic unit. Thus, "a man" in the phrase "a man's house is his castle" is not invoked as an individual, but as a symbol of the domestic whole.

64. *See* HIXSON, *supra* note 16, at 13 (citing DAVID H. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND 87-88 (1972)).

65. The Industrial Revolution ushered in changes that are clear precursors to the dramatic changes in family life and family law that are becoming manifest today. With the emergence of wide-scale factory production, household members, especially males, left the household during significant periods of each day. Among other things, this momentous shift led to real changes in common understandings of "father." *See* BARBARA EHRENREICH & DEIRDRE ENGLISH, FOR HER OWN GOOD 10-11 (1978) (explaining that changes in work patterns ended traditional forms of the father's dominance in family and social relationships); *see also* Dolgin, *supra* note 1, at 647-49 (describing how the father's regular absence from the home harmonized with definitions of the father as a family member by choice, rather than by nature).

66. For instance, in England alone, the range of kin living together in households narrowed significantly between the seventeenth and nineteenth centuries. One explanation focuses on the rise in population and the fall in real wages during the period, making labor cheaper while simultaneously increasing the cost of feeding farm workers in the farm owner's home. These changes may provide one explanation for smaller residential units by the early nineteenth century. Richard Wall, *The Household: Demographic and Economic Change in England, 1650-1970, in* FAMILY FORMS IN HISTORIC EUROPE 499-501 (Richard Wall et al. eds., 1983).

67. *See* Francis Olsen, *The Politics of Family Law, in* FAMILY MATTERS, *supra* note 17, at 336, 337-40 (describing the "liberalization" of the family).

hundred years—preserved well into the twentieth century both the holism and the hierarchy that characterized most of feudal life. And, within the family, affection and intimacy were consistently cemented by the perception of biological inevitability. Equally, the obligations and rights accorded people within families were understood as predicated upon the *substantial* links (called ties of blood or genes) that were consistently understood to define families.[68] This basic, underlying pattern remained constant for hundreds of years.

Moreover, the privacy of the modern family remained rather like that of the medieval family. The family as a whole constituted a small universe, separate and protected from the rules of the society at large.[69] Within the family, the locus of privacy clearly remained, at least until quite recently, the unit as a whole—not any particular person. And in that regard, the family also resembled the domestic units of the medieval period.

2. Shifts in the Character of the Family and of Family Law

Within the past three decades, courts and legislators have dramatically altered the character of family law. The legal system increasingly views family members as business associates and contract partners. Similarly (though less wholeheartedly), the law has come to view family members as victims and tortfeasors.[70] In a development almost unimaginable three decades ago,[71] potential spouses may now enter contracts defining the terms of a future separation or divorce;[72] unmarried cohabitants may similarly negotiate the terms of their relationship and of its potential

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68. *See* Dolgin, *supra* note 1, at 642-47 (analyzing understanding of biology in ideology of family).

69. Although this pattern began to erode with the French Revolution and with the Industrial Revolution, the significance of the shift for the Western family did not fully reveal itself until the last part of the twentieth century.

70. That the law has been quicker to apply contract law than tort law to family relationships is probably not accidental. The contractually implicit definition of family members as autonomous individuals seems less obviously threatening to the notion of a "loving family" than the suggestion in tort law that family members, however defined, have no love at all between them and must resolve many injuries judicially.

71. A few cases decided within the last decade have, however, reaffirmed the traditional rule. *See, e.g.*, Busekist v. Busekist, 398 N.W.2d 722, 725 (Neb. 1987) (holding that an antenuptial agreement is not binding at divorce without express or reasonable implication that the agreement is applicable to marriage dissolution); Duncan v. Duncan, 652 S.W.2d 913, 915 (Tenn. App. 1983) (holding void an antenuptial agreement limiting potential alimony because it was conducive to divorce). For a more detailed discussion of recent changes in family law, *see infra* Part III.A.

72. *See, e.g.*, Scherer v. Scherer, 292 S.E.2d 662, 666 (Ga. 1982) (using contract law to decide whether to enforce an antenuptial agreement and delineating criteria that trial courts should use in making such decisions, such as: (1) consideration of whether agreement was obtained through fraud, duress, mistake, misrepresentation, or nondisclosure; (2) consideration of unconscionability; and (3) consideration of whether enforcement of agreement would be unfair in light of changed "facts and circumstances.").

demise;[73] children may bring suit to "divorce" their parents;[74] and lawyers arguing actions based on claims of "sexual fraud" rely on arguments "that often seem more appropriate in savings-and-loan or real-estate cases" than in disputes between lovers or spouses.[75]

These changes parallel revolutionary shifts in the composition of the American family. Elaine Tyler May defines 1960 as a "demographic watershed" in the character of the American family.[76] By the 1970s, fifty percent of American marriages terminated in divorce; twenty-five percent of households consisted of one individual; and only thirty-three percent of families contained two parents and their minor children.[77] By the mid-1980s, less than fifteen percent of American families contained a working father, a stay-at-home mother, and their children.[78] Further, in 1950, twelve percent of mothers of preschool children worked. In 1980, forty-five percent worked and by the late 1980s, more than sixty-six percent of three- and four-year-old children were in daycare or nursery school.[79] Although there is no clear evidence as to whether family law primarily follows or leads families in these matters, the two have certainly walked a similar route in the last half of the present century.

Hundreds of years after the universe of contract[80] replaced the universe of "status" in almost all spheres of Western society, the family—one of the last vestiges of that older order—is shedding its medieval past. More and more, American society views the family as a collection of separate individuals, free to design the contours and the duration of their connections.

II. PRIVACY AND THE DEMISE OF FAMILY: *LOCHNER, GRISWOLD,* AND *EISENSTADT*

For more than a thousand years, the family in the West was understood to be, and functioned as, a private domain. Its members were linked through ties of blood into a hierarchically organized whole characterized

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73. *See, e.g.,* Marvin v. Marvin, 557 P.2d 106, 114-16 (Cal. 1976) (upholding the validity of contractual agreements between domestic partners as long as consideration is other than sexual services); Morone v. Morone, 413 N.E.2d 1154, 1155-57 (N.Y. 1980) (upholding express, but not implied, contracts between cohabitants).

74. *See, e.g.,* William Booth, *Boy Wins Parental 'Divorce': 12-Year Old's Case First of Its Kind,* WASH. POST, Sept. 26, 1992, at A1 (granting termination of abusive mother's parental rights at boy's request).

75. Ellen J. Pollack, *As Remedy for Certain Broken Promises, Professor Proposes 'Sexual Fraud' Suits,* WALL ST. J., June 11, 1993, at B1.

76. Elaine Tyler May, *Myths and Realities of the American Family, in* 5 A HISTORY OF PRIVATE LIFE 539, 583 (Antoine Prost & Gerard Vincent eds., Arthur Goldhammer trans., 1991).

77. *Id.* at 583.

78. *Id.* at 587.

79. *Id.*

80. MAINE, *supra* note 23, at 99; *see also supra* notes 23-29 and accompanying text (setting forth Maine's distinction between status and contract).

by enduring bonds of loyalty. Yet only in 1965[81] in *Griswold v. Connecticut*[82] did the Supreme Court enumerate a right to family "privacy,"[83] and then the decision posed unending social and constitutional conundrums.[84] In part, the confusions engendered by *Griswold* resulted from the Court's use of traditional rhetoric—the rhetoric of family and home—to delineate and protect a right that was already being loosed from its traditional domestic anchor.

To deal with some of the confusion caused by the tensions between constitutional discourse and evolving social understandings of privacy, subsequent cases and constitutional scholarship have largely reinterpreted

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81. *See infra* notes 102-104 and accompanying text (discussing individualism inherent to American law and the consequences of this individualist frame for the law's response to group claims and group concerns).

In fact, *Griswold* followed from earlier cases premised on a right or rights, rather like the "privacy" right articulated in *Griswold*. *See, e.g.,* Prince v. Massachusetts, 321 U.S. 158 (1944) (recognizing, in dictum, private interest of parents in making childrearing choices); Skinner v. Oklahoma, 316 U.S. 535 (1942) (protecting constitutional right not to be sterilized). Unlike *Griswold*, those cases were taken as isolated decisions without any necessarily far-reaching implications.

82. 381 U.S. 479 (1965).

83. The *Griswold* Court found the origins of the constitutional right to privacy in two earlier cases: Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating a state statute that precluded teaching in any language other than English) and Pierce v. Society of Sisters, 268 U.S. 510 (1925) (invalidating a state statute that required children to be educated in public schools). The decisions in these cases were not predicated on an explicit right to privacy, but on a right to contract. *See Griswold,* 381 U.S. at 482; *Meyer,* 262 U.S. at 399-400; *Pierce,* 268 U.S. at 534-35. However, the Court's use of *Meyer* and *Pierce* as precedents for the right to privacy articulated in *Griswold* and later cases is reasonable. *See, e.g.,* Hodgson v. Minnesota, 497 U.S. 417, 446-47 (1990) (holding that, although the state has a legitimate interest in creation and dissolution of the marriage contract, the family has a privacy interest in intimacies of the marital relationship that is protected by the Constitution against undue state interference). *Cf.* Bowers v. Hardwick, 478 U.S. 186, 190 (1986) (upholding the constitutional right of privacy to family, marriage, and procreation, but not extending it to homosexual activity). In both *Meyer* and *Pierce,* the Court limited the power of the state to interfere "with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce,* 268 U.S. at 534.

84. The central debate surrounding the "privacy" cases (including *Griswold, Eisenstadt,* and *Roe,* among others) has occurred between the "interpretivists," who argue that nothing in the Constitution's text supports reference to a right to "privacy," a right to marriage or abortion, or a right to autonomy, and the "noninterpretivists," who argue that courts should not limit their decisionmaking with reference to values explicit in the Constitution. *See Developments in the Law: The Constitution and the Family,* 93 HARV. L. REV. 1156, 1169 (1980) [hereinafter *Developments*]. John Hart Ely defined interpretive review as that limited to protecting "norms that are stated or clearly implicit in the written Constitution" and noninterpretive review as that protecting "norms that cannot be discovered within the four corners" of the Constitution. JOHN HART ELY, DEMOCRACY AND DISTRUST 1 (1980); *see also* Eric M. Freedman, *Book Review,* 48 BROOK. L. REV. 391 (1982) (reviewing DEMOCRACY AND DISTRUST).

Behind the theoretical concerns at issue in this debate are other less frequently articulated concerns such as those involving the changing meaning of "home" and "work" (and thus of "person" and "group") in American society. For consideration of these concerns, *see infra* notes 151-168 and accompanying text.

and renamed the right to privacy articulated in *Griswold*.[85] This right is extended in *Eisenstadt v. Baird*[86] beyond the family unit to the individuals who compose that unit. The specification and extension in *Eisenstadt* of the right described in *Griswold*—the right to *individual* privacy within the family unit—provides a key to understanding the process that has altered, and continues to alter, the essence of the American family.

Eisenstadt signals a basic and remarkable ideological shift. In that shift, the terms through which people understand the world of home and the terms in which they understand the world of work merge. In consequence, the traditionally strong boundary between domestic affairs and the affairs of the market blurs.[87] Increasingly, family relations can be defined either in familiar, traditional terms of domestic affection and enduring commitment, *or* in terms previously appropriate to the market but not to the home—the terms that define autonomous individuals and the bargains that they effect.

Comparing *Eisenstadt* first to *Griswold,* the precedent that *Eisenstadt* invoked, and then to *Lochner v. New York,*[88] the 1905 Supreme Court decision that supporters of *Griswold* and *Eisenstadt* despised, reveals the character and the consequences of the ideological shift that continues to reshape and redefine the American family.

A. *GRISWOLD* AND *EISENSTADT*

The far-reaching implications of the Supreme Court's decision in *Eisenstadt* can be best appreciated by first considering *Griswold* and the limits of

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85. Judicial and scholarly commentaries on the "privacy" cases have frequently suggested that the Court's choice of the term "privacy" to describe the right at issue in those cases was unfortunate. *See, e.g., Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (rejecting Justice Douglas's broad view of privacy); Poe v. Ullman, 367 U.S. 497, 539-45 (1961) (Harlan, J., dissenting) (setting forth Harlan's rationale for his later concurrence in *Roe*); Whalen v. Roe, 429 U.S. 589, 598 n.23 (1977) (describing *Roe* decision as having categorized the "privacy" right as part of due process liberty and not as "an independent source of constitutional protection"); *see also* Hafen, *supra* note 11, at 523; *Developments, supra* note 84, at 1183 (suggesting that the right to "privacy" delineated in *Griswold* is either a right to enjoy the fundamental nature of marriage *or* a right to autonomy in decisions about contraception). The later suggestion makes some sense in the context of constitutional interpretation. In theory, use of the term "liberty" to describe the right at issue in *Griswold* might have avoided some of the interpretive problems that followed the Court's protection of a right not enumerated in the Constitution itself. However, had *Griswold* been predicated on a liberty interest, the decision would have too plainly resembled the Court's earlier protection of economic rights in *Lochner v. New York,* 198 U.S. 45 (1905). *See Griswold,* 381 U.S. at 482 (declining any invitation to decide *Griswold* on a *Lochner* model). In his concurrence in *Griswold,* Justice Harlan did, however, suggest that Connecticut's birth control law was unconstitutional as a violation of the "liberty" interest protected by the Fourteenth Amendment. *See* 381 U.S. at 502 (Harlan, J., concurring). For a discussion of *Lochner,* see *infra* notes 126-141 and accompanying text.

86. 405 U.S. 438 (1972).

87. *See* STEVEN BARNETT & MARTIN SILVERMAN, IDEOLOGY AND EVERYDAY LIFE 62-67 (1979) (discussing substitutability of "home" and "work").

88. 198 U.S. 45 (1905).

that decision's rhetoric, and then examining *Eisenstadt* and the distinctions between the two opinions. In *Griswold,*[89] the Court justified its decision to declare Connecticut's birth control statute unconstitutional by reference to a certain view of the family. The text of the Court's decision clearly limits the holding to cases involving married couples. The state, declared the Court in *Griswold,* cannot invade the "zone of privacy"[90] that surrounds the marital relationship.

Griswold was controversial when it was decided.[91] However, none of the

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89. The appellants in *Griswold* were Estelle T. Griswold, the Executive Director of the Planned Parenthood League of Connecticut and C. Lee Buxton, a doctor and professor at Yale Medical School who had served as a medical director at the New Haven center of Planned Parenthood of Connecticut. *Griswold,* 381 U.S. at 480. Both were found guilty of having been accessories to violations of the Connecticut birth control law. Both had given "information, instruction, and medical advice" to married people in order to help them avoid conception. *Id.*

The statutory sections in question were sections 53-32 and 54-196 of the General Statutes of Connecticut. *Id.* at 480. Section 53-32 provided: "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." CONN. GEN. STAT. § 53-32 (1958), *quoted in Griswold,* 381 U.S. at 480. Section 54-196 provided: "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." CONN. GEN. STAT. § 54-196 (1958), *quoted in Griswold,* 381 U.S. at 480.

90. *Griswold,* 381 U.S. at 485.

91. *Griswold* was controversial primarily for reviving a *Lochner* "substantive due process" approach to the Constitution. The Constitution forbids federal and state governments from depriving people of "life, liberty, or property, without due process of law." U.S. CONST. amends. V, XIV. In addition to the protection those clauses obviously provide against procedural deprivations of rights, courts have found substantive protections in the Fifth and Fourteenth Amendments. This doctrine, which protects certain deprivations of life, liberty, or property regardless of the adequacy of the legal processes behind that deprivation, is known as substantive due process. *See Developments, supra* note 84, at 1166.

Precisely to avoid the assertion that *Griswold* replicated a *Lochner* substantive due process approach, the Court in *Griswold* tied the holding to a right to "privacy," rather than to a due process Fourteenth Amendment right to liberty. *See infra* notes 99-115 and accompanying text. Moreover, in an apparent effort to avoid all reference to the Fourteenth Amendment, the Court established the "penumbral" approach to constitutional interpretation. Justice Black's dissent in *Griswold* described both efforts as attempts to rewrite, and not to interpret, the Constitution. Justice Black wrote:

> My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country.

Griswold, 381 U.S. at 520-21 (Black, J., dissenting).

The right to privacy articulated in *Griswold* "has proved as consequential as any constitutional right recognized by the Supreme Court," BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 227 (1985), and has provided the central precedent for a host of later cases including Eisenstadt v. Baird, 405 U.S. 438 (1972), and Roe v. Wade, 410

disagreements that surrounded *Griswold* focused on, or were engendered by, the Court's invocation of marriage as a "sacred," "intimate," and "enduring" state.[92] As a cultural, social, and political matter, that claim was almost incontrovertible in the United States in 1965.[93]

The clear language of *Griswold* suggests a reading that extends privacy rights to married couples because family relationships, unlike other relationships in which individuals may engage, should partake of sacred privilege. That position is express in the majority opinion's emotional conclusion, which makes stirring reference to the family unit as explanation and justification for the Court's decision. The Court wrote:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[94]

Thus, almost without question, the text of *Griswold* provides constitutional protection to relations between spouses *within* families, and any extension of that protection to people outside families relies on a mode of reasoning not even implied by the text of *Griswold*. Moreover, *Griswold* suggests the protection is afforded the marital couple, as such, and not the individuals who compose it.

The language of the opinion reflected accurately the larger society's view of families, a view long reinforced in the law. The Constitution makes no reference to any privacy rights that protect relationships between married couples or among family members generally. However, a long tradition of family case law extols the "autonomous" family unit and protects it, except in the most compelling circumstances, from state intervention.[95] Thus, in fact—though not from the perspective of constitutional

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U.S. 113 (1973). Since *Griswold,* the penumbral approach has been almost entirely discarded, and the right to privacy is generally justified by direct reference to the Fourteenth Amendment.

92. *Griswold,* 381 U.S. at 486.

93. Ironically, the years immediately following *Griswold* witnessed shifts in family law that moved it away from the traditional view of the family reflected in Justice Douglas's *Griswold* opinion. *See* Jana B. Singer, *The Privatization of Family Law,* 1992 WIS. L. REV. 1443 (discussing changes in family law system in last several decades).

94. *Griswold,* 381 U.S. at 486.

95. *See, e.g.,* Commonwealth v. George, 56 A.2d 228, 231 (Pa. 1948) (asserting courts would not become "a sounding board for domestic financial disagreements"); McGuire v. McGuire, 59 N.W.2d 336, 342 (1953) (declaring in suit by wife against husband for support that "[t]he living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his

theory—the Court's decision in *Griswold* acknowledges and reiterates a long-standing, widely accepted, common-law view that, in most cases, relations between family members should not be subjected to state regulation or perusal. The controversies surrounding *Griswold* cannot be explained as a response to the notion of "family autonomy" per se.[96] Those controversies focused expressly[97] on the constitutional grounding, but not upon the wisdom or historical accuracy, of the *Griswold* Court's claims about the character of the family.[98] Those who criticized *Griswold* did not question the vision of the family inherent in the opinion's constitutionalization of family autonomy. Rather, they questioned the Court's attempt to ground a right to "privacy"—whether familial or individual—on constitutional "penumbras"[99] instead of on the language in the Constitution.[100]

The interpretative debate encouraged by *Griswold* was complicated by other confusions in the Court's opinion. Most important, it is not clear whether, at the constitutional level, the opinion invoked a right to family privacy that had long been recognized by states, or whether the Court was extending a new right to the *individual*—the right to privacy in family

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wealth and circumstances, leaves little to be said in his behalf"); *see also* IRA ELLMAN ET AL., FAMILY LAW 88 (2d ed. 1991) (describing cases such as *McGuire* "as establishing a common law doctrine of family autonomy into which the state will rarely intrude").

Doctrines of family autonomy have always been limited by both the state's police power and its *parens patriae* function. Using the police power, a state may intervene in family matters in order to prevent harm to individual people or to protect the public welfare. Under its *parens patriae* power, the state may intervene in families to protect the welfare of children or of people labelled incompetent. *Developments, supra* note 84, at 1198; *see also* Olsen, *supra* note 17, at 281 (describing notions of state intervention and nonintervention as ideological matters).

96. Those who urge application of the Ninth Amendment to cases such as *Griswold* would indeed argue that the common-law position—that relationships within families should not be subjected to state interference—supports the use of the Constitution to reach the same substantive end. *See* Randy E. Barnett, *Reconceiving the Ninth Amendment,* 74 CORNELL L. REV. 1, 32-39 (1988) (describing methods for interpreting unenumerated rights protected by the Ninth Amendment); *see also supra* note 84 (describing the debate between constitutional interpretivists and noninterpretivists).

97. In addition, beneath the express debate about the Court's decision in *Griswold* was the complicated, volatile history of contraception—both marital and nonmarital—and of the role of Planned Parenthood for which appellant Griswold worked as an executive director. *See, e.g.,* ELLEN CHESLER, WOMAN OF VALOR 223-31 (1992) (tracing the history of political support for birth control and the origins of family planning clinics). Moreover, the terms of that history were altered fundamentally with the development of an effective birth control pill in the mid-1950s. *Id.* at 429-40.

98. *See* Thomas C. Grey, *Eros, Civilization and the Burger Court,* 43 LAW & CONTEMP. PROBS. 83, 84 (1980) (defining the constitutional issue as marital privacy versus general protection against moral restraints); Hafen, *supra* note 11, at 518 (discussing the "right to be let alone").

99. *Griswold,* 381 U.S. at 484 (referring to cases that "suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance").

100. *See supra* note 95 (considering interventionist and noninterventionist responses to *Griswold*).

matters. Certainly, the opinion refers to *marital* privacy. The language of the text makes it abundantly clear that the Court was concerned about safeguarding the family, as a sacred unit, from state intrusion. Even when the decision was rendered in the mid-1960s, however, commentators read *Griswold* to protect the private sexual behavior of individual adults, rather than to protect behavior of any kind, including sexual behavior, *within* families.[101] But, if that reading reflected the Court's intent, it certainly contradicted the Court's words.

That commentators immediately reached alternative readings was largely testimony to the rhetorical strength of *individual* rights in contemporary understandings of constitutional rights and not to anything implied in *Griswold* itself.[102] American law has steadfastly concerned itself with relations between, or the rights and obligations of, autonomous individuals[103] and, in general, cannot or will not seriously address group needs or responsibilities except by focusing on the needs or responsibilities of the individuals that compose such groups. Constitutional practice similarly demands the invocation of *individual* rights.[104] With the significant exception of family law matters, which have largely been left to the states, the American legal system has always focused on the individual, not the group, as the unit for which rules are devised and effected.

That family law so long remained an exception to the individualistic focus of the society's legal system reflects the strength of the distinction for Americans between home and work, the strength of the distinction be-

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101. Anita L. Allen, *Autonomy's Magic Wand: Abortion and Constitutional Interpretation*, 72 B.U. L. REV. 683, 687 (1992); Phyllis Coleman, *Who's Been Sleeping in My Bed? You and Me, and the State Makes Three*, 24 IND. L. REV. 399, 404 (1981).

102. *See* Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 317 (1988); *see also infra* notes 106-108 and accompanying text (describing possible differences in meaning of *Griswold's* text and its subtext).

103. Family law has been a remarkable exception in this regard and one that points dramatically to the power of traditional "family" values in the American tradition. Even today, as family law moves rapidly away from its ancient roots, those roots can be discerned. Family law is rooted in a social order that understood and provided for group interactions apart from the individuals composing such groups. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 500-02 (2d ed. 1985).

104. *See* Grey, *supra* note 98, at 88 (asserting that, although contraception and abortion cases may be decided with the goal of promoting social stability, the decisions are justified "in the language of individual rights"). Interestingly, one case often noted as evidence of constitutional law's ability to consider and provide for group interests was premised at least in part on the unique operation of Amish families within their community's religious system. *See* Yoder v. Wisconsin, 406 U.S. 205 (1972) (granting Amish parents the right to keep their children from attending public high school despite a state compulsory high school education statute). After *Yoder*, as before it, courts continued to uphold compulsory education statutes despite religious objections. *See, e.g.*, People v. Serna, 139 Cal. Rptr. 426 (Ct. App. 1977) (holding that despite belief in evils of segregated schools, parents could not keep children out of segregated schools); *In re* McMillan, 30 N.C. App. 235 (Ct. App. 1976) (ruling that a parent is not permitted to keep child home from school on the ground that the school failed to teach native culture).

tween the family and virtually all other associations. Thus, in sum, the *Griswold* opinion, though open to honest debate for its invocation of rights not expressly stated in the Constitution, reflected a mainstream view of the American family and its special place in the culture.

If the commentators were right, or even partly right, in focusing on individual rights, an explanation is in order, and several can be found. It is possible that the Court clothed its message in traditional rhetoric in an attempt to preclude, or at least dull, the controversy that would likely develop in response to a decision that, at least by implication, protected the individual's right to sexual freedom. The very issues at stake in *Griswold,* the availability of contraception and the role of Planned Parenthood had long provoked angry debate about the mores of the era.[105] The Court, in anticipation of controversy, may have consciously selected family metaphors to describe the privacy right delineated in *Griswold* in order to soften the implications of a more libertarian position, one that implied "the constitutionalization of some contemporary version of John Stuart Mill's principle of liberty."[106] This explanation of the disparity between the text of *Griswold* and its immediate interpretation and use by the larger society suggests that the language of the majority opinion was artfully chosen to mask an underlying agenda.

More likely, a somewhat different explanation is in order; the justices who wrote *Griswold* may themselves have been ambivalent or confused about the implications of the case. *Griswold* came to the Court at a moment of startling transition in the life of the American family, and in the midst of reactions of American law to the changes in family life. When *Griswold* was decided, however, neither the scope nor the intensity of that transition had yet emerged concretely. Thus, it is possible that the Court's invocation of traditional family values and its disruption of those values in the name of the individual's right to privacy and freedom reflected a real, though not necessarily completely obvious, conflict for the justices who decided *Griswold* just as a period of astonishing alteration in family life and family law was beginning.

Comparing an earlier draft of *Griswold* to the opinion finally rendered by the Court shows that the Court was originally uncertain about grounding the *Griswold* holding in a right to privacy, buttressed by domestic metaphors.[107] In a draft opinion of the Court, Justice Douglas founded the *Griswold* holding on a First Amendment right of spouses to associate

105. *See* CHESLER, *supra* note 97, at 201-13, 329-30 (detailing the emotional reactions to those advocating the availability of birth control before the 1960s).

106. Grey, *supra* note 98, at 84.

107. SCHWARTZ, *supra* note 91, at 227-39 (reproducing draft opinion of Griswold v. Connecticut). The earlier draft also makes clear the Court's uncertainty about the constitutional theory on which to base the holding in *Griswold.*

freely.[108] Such a rationale would have suggested the spouse's freedom in associating with the other, a subspecies of individual rights, rather than the collective privacy of a family unit.

Concurring opinions in *Griswold*[109] similarly invoked domestic metaphors to describe and legitimate the right to privacy and similarly suggested that this right belonged to individuals within families rather than to families as such. Justice Goldberg[110] declared that "the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected [by the Constitution]."[111] Justice Harlan[112] urged protecting the "privacy of the home" so that individuals could control information about intimate matters.[113] At home, individuals deserved to be "let alone."[114] Finally, Justice White predicated the right extended on respect for the "marriage relationship," but he did not explain why.[115]

Eisenstadt v. Baird carried a different message. *Eisenstadt* presented exactly the position that commentators attributed to *Griswold*. Decided seven years after *Griswold*, *Eisenstadt* declared unconstitutional a Massachu-

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108. *Id.* at 231-36. Justice Douglas articulated a right to privacy in a dissenting opinion in Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952). The case involved the right of a street car company in the District of Columbia to broadcast radio programs through loudspeakers on street cars and buses. There, Justice Douglas wrote:

> The right to be let alone is indeed the beginning of all freedom. Part of our claim to privacy is in the prohibition of the Fourth Amendment against unreasonable searches and seizures. It gives the guarantee that a man's home is his castle beyond invasion either by inquisitive or by officious people. A man loses that privacy of course when he goes upon the streets or enters public places. But even in his activities outside the home he has immunities from controls bearing on privacy. He may not be compelled against his will to attend a religious service; he may not be forced to make an affirmation or observe a ritual that violates his scruples; he may not be made to accept one religious, political, or philosophical creed as against another.

Id. at 467 (Douglas, J., dissenting).

109. Concurring opinions were written by Justices Goldberg, Harlan, and White. Of the seven justices who joined or concurred in the *Griswold* holding, no more than three agreed upon the nature of the constitutional support for that holding.

110. Justice Goldberg's concurrence in *Griswold* stressed the importance of the Ninth Amendment to legitimate the Court's holding. The Ninth Amendment states that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

111. *Griswold,* 381 U.S. at 495 (Goldberg, J., concurring).

112. Justice Harlan's concurrence found that the Connecticut birth control statute violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 500 (Harlan, J., concurring).

113. Poe v. Ullman, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) (referred to, and relied on, in Justice Harlan's concurrence in *Griswold,* 381 U.S. at 500).

114. *Id.* at 550-51.

115. Justice White, like Justice Harlan, relied on the Due Process Clause of the Fourteenth Amendment. *Griswold,* 381 U.S. at 502 (White, J., concurring).

setts statute that prohibited the distribution of contraception to *unmarried* adults.[116]

The Court's decision in *Eisenstadt* discards the distinction, at least in the law's eyes, between home and work, and firmly attaches the right of privacy to the individual person. Indeed, *Eisenstadt* expressly disavows any view of families as more, or other, than the individuals who compose them. The *Eisenstadt* Court explained:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[117]

That explanation was essential to the Court's equal protection analysis in *Eisenstadt*. *Griswold,* decided seven years before, had made it unconstitutional for states to prevent married couples from using birth control. The conclusion in *Eisenstadt,* that a similar rule must apply with regard to unmarried persons, was premised on the conclusion that a state's different treatment of married and unmarried persons in a birth control statute lacked a rational basis[118] and could therefore not be tolerated.[119]

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116. *See Eisenstadt,* 405 U.S. at 440-41. At issue in the case was a Massachusetts statute providing a maximum five-year prison term for "whoever . . . gives away . . . any drug, medicine, instrument or article whatever for the prevention of conception." MASS. GEN. LAWS. ANN. ch. 272, §§ 21-21A (West 1990). Section 21A made exceptions for physicians and pharmacists who were authorized to provide such items to married people.

William Baird, the appellee in the case, was convicted at trial in the Massachusetts Superior Court for exhibiting contraceptive devices during a speech to students at Boston University and for giving a package of Emko vaginal foam to a woman at the end of his lecture. 405 U.S. at 440. The Massachusetts Supreme Judicial Court sustained the conviction for giving the contraceptive foam to the woman, but set aside the conviction for exhibiting contraceptive devices as a violation of Baird's First Amendment rights.

The record contained no evidence as to the marital status of the woman to whom Baird gave the Emko foam. However, the opinion of the Court of Appeals does refer to her as "an unmarried adult woman." *Id.* at 440 (citing 429 F.2d 1398, 1399 (1970)). The Supreme Court ultimately based its decision on the equal protection of unmarried, as compared with married, persons. *Id.* at 447.

117. *Id.* at 453.

118. As a technical matter, because a fundamental right is at stake in such cases, the state should probably have to show something more than a rational basis for its statute. *See, e.g.,* People v. Onofre, 415 N.E.2d 936, 943 n.6 (1980) (declaring a New York sodomy statute unconstitutional on federal due process and equal protection grounds).

119. In *Eisenstadt,* the Supreme Court decided initially that the statute could not be justified as a deterrent to fornication because that purpose would be badly served by the statute. Under the Massachusetts law, contraceptives were available to prevent the spread of disease and were available to married persons for use in marital or extramarital relations. In

The Court in *Eisenstadt* concluded that "by providing dissimilar treatment for married and unmarried persons who are similarly situated, [the Massachusetts statute in question] violate[s] the Equal Protection Clause."[120] But, in a world in which the bonds that connect family members are viewed as inherently unlike the connections that link autonomous individuals, the dissimilar treatment at issue in *Eisenstadt* would be not only rational; it would be inevitable. As long as the family continued to enjoy the sacred prerogatives its feudal history implies, it made perfect sense for the law to treat legally married couples differently than other people in other sorts of groupings. In such a world, neither the relationship between spouses nor relationships within families generally could be described as an "association" of "individuals each with a separate intellectual and emotional makeup."[121]

Thus, the claim in *Eisenstadt* is far more startling and far less traditional than that in *Griswold*.[122] The *Eisenstadt* Court's reference to a married couple as an "association of two individuals" and its language affirming the right of the "individual" to privacy seem familiar in a world largely defined through, and deeply dependent on, notions of the autonomous individual. In fact, it is revolutionary when applied to the family. Long after the last vestiges of the feudal order were replaced in the marketplace by notions of free contract and autonomous individuality, Western society continued to define spouses—and, even more particularly, parents and their children—as units of relationship with a reality apart from, and encompassing, that of the individuals involved. The Court's straightforward, unapologetic description in *Eisenstadt* of the "marital couple" as nothing other than two

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addition, the Court described it as "plainly unreasonable" for the state to punish fornication (a misdemeanor under state law) with pregnancy and the birth of an unwanted child. *Eisenstadt*, 405 U.S. at 448-49. Moreover, the Court concluded that the statute, originally promulgated as part of a chapter dealing with 'Crimes Against Chastity, Morality, Decency and Good Order,' could not be justified as a health measure. Among other things, if protecting health demands that contraceptives be prescribed by physicians, that need pertains to married and unmarried persons. In addition, not all contraceptives posed a danger to health; thus the statute, if justified as a health measure, would be overbroad. *Id.* at 450-51. Finally, the Court concluded that if the state's purpose consisted of the prohibition of contraception per se, then that purpose must apply equally to married and unmarried persons. *Id.* at 452-53.

120. *Id.* at 454-55.

121. *Id.* at 453.

122. It might be argued that today, when constitutional rights are individual rights, the constitutionalization of privacy in the family context must assume the individualization of the once holistic family. Such an argument would suggest further that in a world of traditional families regulated by a traditional family law system, there was no need to constitutionalize family privacy because family law assumed, and therefore protected, privacy within the family. To the extent that is so, *Griswold* foreshadowed *Eisenstadt* in heralding the changes discussed in this article, including the erosion of the family as a unit mediating between the individual and the state. *See supra* notes 105-115 and accompanying text (discussing possible implications of *Griswold*'s subtext).

people associated together signals a fundamental alteration in the society's view of the sort of intimacy we have traditionally associated with families.

Whatever the role of *Eisenstadt* in the evolution of family law and the jurisprudence of "privacy" law,[123] the opinion constitutes an important statement from the Supreme Court about the changing character of the American family. Commentators have described *Eisenstadt* as an extension to nontraditional families of the protection the Constitution (as interpreted in *Griswold*) grants the family. Thus, a 1991 family law casebook discusses *Eisenstadt* in its section on "Constitutional Protection of Nontraditional Families" and explains:

> We begin [our discussion of the topic] with *Griswold v. Connecticut,* the modern source of the constitutional right of intimate association. *Eisenstadt v. Baird* follows because it is the first case to vindicate, if obliquely, the constitutional claims of the unmarried, and is therefore the foundation case in any argument urging protection of nontraditional families.[124]

The notion of a "nontraditional family" has indeed been widely institutionalized in the years following *Eisenstadt*.[125] It is a notion that depends on the license granted in *Eisenstadt* to define and form families as units involving no more than the separate individuals recruited to play a familial part. The family—understood as a whole and grounded in natural (e.g., "blood" or "genes") or supernatural truths suggesting inevitably each member's roles and obligations—is thus replaced by a group of people ultimately unfettered by inexorable ties of relationship. This is the association to which the Court in *Eisenstadt* referred.

B. *EISENSTADT* AND *LOCHNER*

Curiously, though not by accident, the far-reaching implications of the transformation in the understanding and place of the family in American society that *Eisenstadt* signals becomes clear when *Eisenstadt* is compared to a much earlier, though equally controversial, case. In 1905, in *Lochner v. New York*,[126] the Supreme Court invalidated a New York statute that

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123. In later cases, the Supreme Court moved back from its position in *Eisenstadt* and from the extension of that position in Roe v. Wade. *See* Hafen, *supra* note 11, at 538; *see also infra* text accompanying note 239.

124. ELLMAN ET AL., *supra* note 95, at 849.

125. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989). In *Michael H.*, Justice Scalia, writing for the Court, limited the definition of what the Court called a "unitary family" to the marital family and a "household of unmarried parents and their children." *Id.* at 123 n.3. "Perhaps," wrote Justice Scalia, "the concept can be expanded even beyond this, but it will bear no resemblance to traditionally respected relationships—and will thus cease to have any constitutional significance—if it is stretched so far as to include the relationship established between a married woman, her lover, and their child." *Id.*

126. 198 U.S. 45 (1905).

prohibited bakers from working more than sixty hours in a week or more than ten hours in a day.[127] The Court, describing the statute as an interference with "the liberty of person" and "the right of free contract,"[128] held the law unconstitutional as a violation of the Fourteenth Amendment.

The opinion, now almost a century old, portrays the ideology[129] of freedom of contract clearly and unapologetically. It thus provides a useful comparison for the later "privacy" cases in which the Court used a similar interpretive approach in the context not of economics or business, but of relationships between people within families. Justice Peckham, writing for the Court in *Lochner*, understood what was at stake. The statute, he explained, was not concerned with the prohibition of involuntary labor. Rather, its opening words—"no employee shall be required or permitted to work"[130]—revealed the statute's purpose. In Justice Peckham's view, the statute was "equivalent to an enactment that 'no employé shall contract or agree to work,' more than ten hours per day."[131] As such, the statute interfered with the employer's and the employee's equal rights to negotiate the terms of their working relationship and, thereby, violated the Constitution's guarantee that individuals be at "liberty" to negotiate the terms through which they "purchase" others' labor or "sell" their own.[132]

The notion that the liberty of contract belongs at least as much to the employee as to the employer emerges as a basic assumption in *Lochner*. In terms perfectly reflecting nineteenth century liberalism's view of individual liberty, the Court referred to the bakery owner and the bakery employee as "persons who are *sui juris*" and focused on the imbalance in power, not between employer and employee, but between the state and the bakery employees affected by the statute. Thus, the Court framed *Lochner* as a

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127. *Id.* at 47. The statute at issue in the case read:

> No employé shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employe shall work.

Id. The other sections governing bakeries imposed requirements aimed at making bakeries healthy, comfortable places of employment for the workers. Among other things, employers were required to provide clean, sanitary rooms with adequate ventilation and size to ensure a healthy environment; they were further required to provide washrooms and water closets separate from the areas in which food was produced. *Id.* at 46-47.

128. *Id.* at 65.

129. *See supra* notes 2 & 46 and accompanying text (discussing the meaning of "ideology" as used in this article and the differences between the universe of contract and the universe of status).

130. *Lochner*, 198 U.S. at 46.

131. *Id.* at 52.

132. *Id.* at 53.

dispute between the state and the individual bakery worker. The Court explained:

> [I]t becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring or from entering into any contract to labor, beyond a certain time prescribed by the State.[133]

The Court argued that the health of bakery workers or of bread eaters could not have been the real motivation behind the statute at issue.[134] Bakeries, the Court reported, do not pose particular dangers to health,[135] and there is no "connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman."[136] Thus, according to the Court, the argument that the statute served the health interests of the employees and the public was mere pretext. The state's motive lay elsewhere. The Court wrote:

> It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employé's (all being men, *sui juris*) in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employé's.[137]

The state's aim, as the Court viewed it, was simply and conclusively to intervene in the market so as to deprive worker and employer alike of the right to negotiate the terms of their own interactions.

The Court's concerns about state regulation presumed that the worker and the employer entered the market negotiation process as equals. Twice, the Court referred to the two as being equal before the law. "The master and his employé's," declared the Court, "all being men, *sui juris*,"[138] should not be subjected to state intervention in their private affairs. The Court affirmed the equality of the two by noting that the "one has as much

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133. *Id.* at 54.

134. As the *Lochner* Court recognized, the liberty interests protected by the Fourteenth Amendment may be subjected to state regulation in cases involving threats to health or welfare. *Id.* at 53. Thus, the Court in *Lochner* cited Jacobson v. Massachusetts, 197 U.S. 11 (1905), in which the Court upheld a Massachusetts statute mandating vaccination as a proper exercise of the state's police power, and Holden v. Hardy, 169 U.S. 366 (1898), in which the Supreme Court upheld a Utah statute that regulated the terms of employment for underground miners. With regard to the latter case, the Court in *Lochner* noted the application of the statute at issue to "the peculiar conditions and effects attending underground mining" and declared that there was "nothing in *Holden v. Hardy* which covers the case now before us." *Lochner,* 198 U.S. at 54.

135. *Lochner,* 198 U.S. at 59.

136. *Id.* at 62.

137. *Id.* at 64.

138. *Id.* at 53, 64.

right to purchase as the other to sell labor."[139] The Court went further, arguing that New York's labor law impugned the equality and intelligence of bakers, who surely could negotiate their own working conditions without governmental interference. The Court wrote:

> There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State.[140]

Justice Holmes's dissent emphasized the economic underpinnings of the Court's holding. To what extent the Court believed in the accuracy of the factual assumptions beneath its economic theory is less clear. But it is clear, as Justice Holmes declared in his dissent, that the Court was motivated by its preference for a substantive outcome contrary to that of New York's labor law. The Court's preference in Justice Holmes's view, though arguably reasonable as a view of economic affairs, failed to provide adequate grounds for a decision invalidating the statute as unconstitutional. Justice Holmes explained:

> It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.[141]

Justice Holmes's criticisms of the Court's decision in *Lochner* are echoed by the critics of *Griswold* and *Eisenstadt* who suggest that the decisions in those cases were also not rooted in the Constitution and were, therefore, the illegitimate products of reading "substantive" guarantees into the Constitution.[142] Just as the Constitution fails to protect the unfettered right to enter contracts that New York, and other states, perceived as threats to public health and welfare, so too the Constitution fails to assert a general right to privacy, or more specific rights, regarding sexual free-

139. *Id.* at 56.
140. *Id.* at 57.
141. *Id.* at 75.
142. *See supra* note 91 (defining the "substantive due process" approach to constitutional interpretation).

dom,[143] marriage,[144] or abortion,[145] protected in privacy cases that followed *Griswold*.[146]

In this regard, the officially repudiated *Lochner* era[147] and its use of substantive due process arguments in constitutional interpretation was revived in another context, at least as a methodological matter, with the *Griswold-Eisenstadt-Roe* line of cases. The later cases use substantive due process to protect not economic interests, but interests related to the family or to decisions that implicate "family" matters.

Curiously, however, those who deplore substantive due process arguments in the economic context often accept them in the noneconomic cases including *Griswold, Eisenstadt,* and *Roe*. Indeed, in deciding *Griswold,* Justice Douglas expressly and decisively disassociated the Court from *Lochner* and the model for protecting liberty interests offered there.[148] The *Lochner* Court, declared Justice Douglas disapprovingly, served as a "super-legislature to determine . . . laws that touch economic problems, business affairs, or social conditions."[149] In distancing the *Griswold* Court from the *Lochner* precedent, Justice Douglas simply distinguished the two statutes because one was concerned with economics, business, or social conditions, while the other "operate[d] directly on an intimate relation of husband and wife."[150] The assumptions on which the Court predicated that distinction between the economic and the intimate or familial were not made clear. However, they can and should be delineated.

The *Griswold* Court suggests that, when determining the constitutionality of a state statute, it is the *content* of the legislation under consideration that determines the legitimacy or illegitimacy of a constitutional approach that relies on contemporary perceptions of values. More specifically, the Court's disclaimer suggests that governmental interference with freedom of contract does not compare in seriousness with governmental interfer-

143. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977) (invalidating a state law restricting advertising and distribution of contraceptives because the law infringed upon "protected individual choices"); Eisenstadt v. Baird, 405 U.S. 438, 451-55 (1972) (holding that an individual's right of access to contraceptives is unaffected by marital status).

144. *See* Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978) (declaring that marriage is a fundamental right).

145. *See* Roe v. Wade, 410 U.S. 113, 152 (1973) (declaring that a limited right to abortion is "fundamental" and is protected by the right to privacy).

146. *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479, 508-09 (1965) (Black, J., dissenting) (opposing the creation of a constitutional right to privacy); RAOUL BERGER, GOVERNMENT BY JUDICIARY 363-72 (1977) (criticizing the privacy discussion as contrary to the original intent of the Framers); Hans A. Linde, *Judges, Critics, and the Realist Tradition,* 82 YALE L.J. 227, 254-55 (1972).

147. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), *rev'g* Adkins v. Children's Hosp., 361 U.S. 525 (1923). *West Coast Hotel* is generally acknowledged to have ended the *Lochner* era. *See Developments, supra* note 84, at 1167 n.52.

148. *Griswold,* 381 U.S. at 481-82.

149. *Id.* at 482.

150. *Id.*

ence in the "intimate relation between husband and wife." Thus, the Court in *Griswold* suggests that the prior form of state interference cannot justify the invocation of contemporary values to interpret the Constitution, but that the latter can.

Embedded in that difference—the difference between the contractual connection of the marketplace and the intimate connections of home and hearth—are the crucial terms that structured American thinking by distinguishing the world of home from the world of work. The Court's decision in *Griswold,* whether consciously or not, used that difference to justify resurrecting a *Lochner* approach to constitutional interpretation.[151] Thus, *Griswold* was written to suggest that a threat to the society's core values, described as the values of the marital tie and the domestic nest, compelled the Court's response. The *Griswold* Court wrote in a way that appeared to reflect and even replicate the wider society's vision of the family as a universe of love and enduring obligation, almost entirely set off from the fungible negotiations that defined the market, and attempted thereby to justify the same sort of noninterpretivist reading of the Constitution that allowed an earlier Court to decide *Lochner* as it did. The Court in *Griswold* appeared to suggest that for this hallowed purpose—and for this purpose alone—the Constitution's protections were meant to be extended and its text stretched. Such was Justice Douglas's apparent reading for the Court.[152]

A seemingly similar reading was suggested by Justice Harlan's concurrence.[153] Justice Harlan described the statutory violation of the Constitution as "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life."[154] He found

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151. It may be possible to explain the antagonism between proponents of a substantive due process approach in a business and economic context and those who endorse a substantive due process approach in cases involving family matters. It would be fruitful to explore the possibility that the first group assumes that home and work are, and should remain, distinct spheres of life, while those in the second group assume the two spheres should be merged. Thus, for the first group (those who wrote and approved *Lochner*), it is as reprehensible for the state to protect workers against the dictates of the market as it is for the state to fail to protect the family from the individualism of the market. *See supra* note 95 and accompanying text (discussing the legal tradition of protecting the family unit from state intervention). For the other group (those who wrote and those who approve *Eisenstadt*), domestic metaphors and rules can and should be applied in the market; thus, workers should be protected by the state. Equally, the rules and metaphors of the market can and should be applied at home. Families should be recognized therefore as no more and no less than collections of assembled individuals whose right to negotiate the terms of their own relations should be protected.

152. In Justice Douglas's opinion for the Court in *Griswold,* the Constitution's "penumbras" permitted these extensions. The Court found protection for the rights at issue in the case in the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments. *See Griswold,* 381 U.S. at 484.

153. *Id.* at 500 (referring to, and relying on Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting)). Justice Harlan dissented in *Poe* on justiciability grounds.

154. Poe v. Ullman, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting) (referred to, and relied on, in Justice Harlan's concurrence in *Griswold,* 381 U.S. at 500).

the right of privacy to be contained in the due process clause of the Fourteenth Amendment's guarantee of liberty. Justice Harlan wrote:

> The best that can be said is that through the course of this Court's decisions [due process] has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.[155]

Justice Harlan's concurrence—although not unlike Justice Douglas's in justifying a noninterpretivist approach by reference to the centrality of values in need of constitutional protection—indicates a serious flaw in the majority's justification for the right of privacy grounded in familial units. Justice Harlan described the liberty interests protected by the Fourteenth Amendment as attaching to the individual. He expressly referred to "the liberty of the individual."[156] In this regard, he was entirely correct as a matter of constitutional jurisprudence. From the beginning, the individual has been the locus of the interests protected by the Constitution. The interests of the family—long preserved in our society as one of the few units with value beyond that of the individuals involved—have been regulated and protected, if at all, by state statutory law and not by the Constitution.[157]

Griswold appeared to justify its form of constitutional interpretation by invoking the inviolability of the family as a whole, separate from the person and the state alike, and thus justly protected from legislative attempts to regulate its most intimate affairs. However, precisely that view of the family—the family as a whole, the family as a unit beyond, but encompassing, its members—had previously placed the family beyond the Constitution's reach. And that fact emerged definitively in *Eisenstadt,* the case in which the implications of *Griswold*'s subtext became clear.

Underlying its simple and seemingly inconsequential distinction between "home" and "work," *Griswold*'s apparently straightforward attempt to distinguish itself from *Lochner* obscured a larger process—the process through which the society's understanding of the family was shifting. In the society at large, the family referred to in *Griswold*—a sacred universe,

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155. *Poe,* 367 U.S. at 542.

156. *Id.*

157. *See* Hafen, *supra* note 11, at 470 (asserting that "[i]deas about individual rights derive from the original theory of the Constitution, which deals with the relationship between the individual and the State," while "[d]omestic relations . . . have traditionally been matters of state law").

understood to be apart from the world of money and work—was becoming the family implied by *Eisenstadt*—a discrete collection of individuals, associating together as a matter of choice.

The remarkable implications of that process are present in *Eisenstadt,* which provides at the level of constitutional adjudication one of the first express indications of a set of astonishing changes occurring in the society. In the seven years between *Griswold* and *Eisenstadt,*[158] a momentous set of changes began to emerge in the structure and scope of the American family and in the law's definition and regulation of that changing family.[159]

A central ideological shift lay behind the more obvious changes in family form and family law. Increasingly, the family began to be seen as a collection of discrete individuals connected by a set of temporary choices and unaffected by the eternal dictates of God or blood.[160] In consequence, the distinction between home and work began to blur, and as it did, family relations no longer appeared so remarkably different from those of the marketplace.

Three decades after *Griswold,* it seems perfectly clear that families, like the rest of the contemporary world,[161] are composed of individuals and, as units of moral value, are no more and no less significant than the individuals involved. As the family is increasingly defined through the terms of the market, it is less often automatically understood as a locus of sacred value, apart from, or rather encompassing, individual family members.[162] To the

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158. Ironically, *Griswold,* but not *Eisenstadt,* can ultimately be harmonized with *Lochner. Griswold* and *Lochner* alike (though the second only implicitly) presume a world in which home and work are separate. *Eisenstadt,* in contrast, discards that distinction.

This comparison of the three cases depends on a reading of *Griswold*'s express language, rather than on guesses about its possible underlying agenda. The opinion's subtext, based on earlier drafts of Justice Douglas's opinion for the Court, see SCHWARTZ, *supra* note 91, at 231-36 (providing the Draft opinion in *Griswold*), as well as Justice Douglas's other writings, would place *Griswold,* not *Eisenstadt,* as the Court's first substantive due process case involving domestic matters. This reading is predicated on a notion of the family as a collection of autonomous individuals, rather than as a structured whole. *Griswold* would therefore contrast with *Lochner*'s message, which declared the market and not the home to be the arena of autonomous individuality. However, and this is the important point, whatever the agenda underlying the *Griswold* decision, the rhetoric and metaphors that were used by the Court suggest the unprecedented character of the *Eisenstadt* decision, which clearly defines the individual as the unit to which value attaches, even within families. *See supra* notes 105-115 (discussing subtext of *Griswold* opinion).

159. *See supra* Part I.C.2 and *infra* Part III.A.

160. Presently, this process is most clear and most complete with regard to adults within families. However, the process is increasingly altering the character of the parent-child tie as well. *See infra* Part III.A.2.

161. *Griswold,* 381 U.S. at 482 (delineating issues of concern to the *Lochner* Court to include "economic problems, business affairs, or social conditions," and disclaiming any interest in sitting "as a super-legislature to determine" such matters).

162. *See* BARNETT & SILVERMAN, *supra* note 87, at 64-67 (describing the difference between defining family relations in terms of substance such as "blood" versus in terms of contract).

extent that families deserve protection from the law, that protection increasingly attaches to individual family members and not to the family unit as an undivided and indivisible whole. That of course was the message of *Eisenstadt*.

Purportedly, *Eisenstadt* grew out of *Griswold,* but that is so only in a limited sense and only if *Griswold*'s express language is ignored. In fact, *Eisenstadt* resembles not *Griswold,* but *Lochner.* The justification buttressing the *Griswold* decision—that the family, surely, had to be free from state intrusion—is present only as allusion in *Eisenstadt.* The *Eisenstadt* Court's equal protection analysis presumes that the protection afforded by *Griswold* applies to individual family members and not to the family or marital unit per se.

Eisenstadt and *Lochner* alike sought to protect the individual from state interference. In both cases, it was the individual as the ultimate unit of social value, the individual as a social whole, joined to others only by choice and never absolutely, whose interests the Court protected. The *Lochner* Court accused the New York maximum hours statute of "limiting the hours in which grown and intelligent men may labor to earn their living" and therefore concluded the law was a "mere meddlesome interference[] with the rights of the individual."[163] The *Eisenstadt* Court took a similar view with regard to adults making sexual and reproductive choices. The Court said the Massachusetts birth control statute at issue curtailed "the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[164]

Differences between the world at issue in *Lochner* (of employer-employee relations) and the world at issue in *Eisenstadt* (of relations between unmarried lovers) remain. These differences are, however, unlike those that once separated home from work in American ideology; the earlier differences depended centrally on an understanding of home and family that precluded autonomous individuality. What is remarkable about the similarity between *Lochner* and *Eisenstadt* is that *Lochner*'s idealized portrait of the nineteenth century market—populated by individuals equally free to make their separate choices and to design their unique connections—was transferred with so little apparent consequence to *Eisenstadt*'s mid-twentieth century portrait of couples—married or unmarried—described as "an association of two individuals each with a separate intellectual and emotional makeup"[165] who deserve constitutional protection. In both *Loch-*

163. *Lochner,* 198 U.S. at 61.
164. *Eisenstadt,* 405 U.S. at 453.
165. *Id.*

ner and *Eisenstadt,* parties to a relationship are considered to possess equal bargaining power.

Despite the similarities between *Lochner* and *Eisenstadt,* however, the two opinions cannot be read to say the same thing. In fact, *Lochner* portrays one pole of a world whose other pole, as defined in nineteenth and early to mid twentieth century American ideology, is the family, whose members were understood to contrast almost totally with the unrestrained individuals of the free market. This is the same family as portrayed, at least on the face of the text, in *Griswold,* but it is not the family envisioned by *Eisenstadt.*

Certainly the justices who wrote *Lochner* would have been as unsettled by *Eisenstadt* as those who wrote *Eisenstadt* were unsettled by *Lochner.* The explanation of each group's real or presumed disquiet with the other is the same. Between *Lochner* and *Eisenstadt* and (more dramatically because more suddenly) between *Griswold* and *Eisenstadt,* established truths about the differences between home and work, and about the people who populated those two worlds, had been torn asunder. For those Justices who wrote *Lochner*—and probably for most of those who approved of the decision—the world of work and the world of home were understood to be inevitably separate. The family as a universe of "enduring, diffuse solidarity" defined through ties of natural substance ("blood")[166] contrasts in almost every regard with the individualism of the marketplace in which "every man is, in principle, an embodiment of humanity at large, and as such he is equal to every other man, and free."[167]

Both *Lochner* and *Eisenstadt* presume the autonomous individual and protect that individual's freedom from unjustified restraint. In *Lochner,* that presumption is expected. In *Eisenstadt,* to the contrary, it is not expected at all. For over a century, Americans had assumed that the autonomous individual existed in the market, but not in the home. *Eisenstadt* is significant for envisioning the autonomous individual at the center of the domestic unit. In this regard, the opinion suggests that a fundamental change had occurred in the society's understanding of the family. For centuries, the family had provided one of the very few contexts in American life within which the putatively equal, unfettered individual of the marketplace was *not* presumed. *Eisenstadt* proclaimed a new view.

In *Eisenstadt,* the family was clearly and unmistakenly recognized as a collection of individuals. In protecting families or activities associated with families, *Eisenstadt* protected the right of the individual, alone, to decide

166. For Schneider's description of the differences between "home" and "work," see *supra* text accompanying notes 19-22.

167. DUMONT, *supra* note 2, at 4.

how to design his or her life.[168] In this regard, *Eisenstadt* does not reflect *Lochner*. It extends it. And ironically the extension contends with the ideological underpinnings of the world in which *Lochner* was decided, a world in which home and work were viewed as fundamentally separate. In this regard, *Eisenstadt* can be distinguished from *Lochner* and *Griswold* alike. Of the three opinions, *Eisenstadt* alone declares expressly that the differences between the marketplace and the home have become essentially incidental.

The very justification offered by the Court for its approach in *Griswold*—that the family as a world apart from the rest of everyday life deserves special protection—was declared illusory by *Eisenstadt*. *Eisenstadt,* despite citing *Griswold* as its central precedent, declared that the family was merely a collection of individuals no different from those who join in other forms of association and thus deserving of no greater or lesser protection than the individuals in market associations.

C. PRIVACY

A more explicit comparison of the privacy rights defined in *Griswold* and in *Eisenstadt* is in order. Scholars have argued correctly that privacy, as we understand the term, was largely absent from an earlier American jurisprudence.[169] As Ken Gormley notes, the meaning of privacy—not only for the law, but for the society more generally—is not written in stone.[170] As the social order changes, so does the meaning of notions such as privacy.[171] Before the present century, almost no individual, as such, was ever able to live a life of privacy as the term is used today. Physical constraints made privacy for the individual all but impossible. In addition, people within families were understood as parts of a larger whole, not as separate, potentially unconnected agents. Within the family, people enjoyed neither physical nor moral privacy. Historically in the West, privacy attached at the level of the group, not of the individual.

Physically, homes were cold and unheated, so people slept several in a bed. Toilet and washing activities were also, in this sense, rarely private. Morally, family members were not expected to demand autonomy. The modern notion of privacy, as a right applying to the individual, did not

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168. *Eisenstadt*'s express language protected only the right to make a certain kind of procreative, or sexual, decision. On the other hand, however, there is no express language in the decision that limits the delineated protection only to people engaged in those few activities. And, of course, the view of the family presented in *Eisenstadt* reappeared in a set of later cases, including Roe v. Wade, 410 U.S. 113 (1973).

169. *See* Thomas H. O'Connor, *The Right to Privacy in Historical Perspective,* 53 MASS. L.Q. 101, 103 (1968) (noting that personal privacy in colonial America was recognized as a matter of personal honor, the invasion of which was more likely to result in a duel than in a legal proceeding).

170. Ken Gormley, *One Hundred Years of Privacy,* 1992 WIS. L. REV. 1335, 1342.

171. *See, e.g., id.* at 1343-44.

develop fully until the nineteenth century, and then only with regard to people outside the domestic context. For about a century more, people *within* families were defined as "private" vis-à-vis the outside world, but not in relation to each other. "Private life should be lived behind walls," wrote Littre in his mid-nineteenth century *Dictionnaire*. "No one," he continued, "is allowed to peer into a private home or to reveal what goes on inside."[172] Thus, sometime between the mid-nineteenth and mid-twentieth centuries, the *level* at which society invoked privacy shifted from the group to the individual.

In *Griswold,* the Supreme Court for the first time expressly established the right to privacy as a constitutional matter.[173] The establishment of individual privacy, suggested perhaps in *Griswold*'s subtext,[174] but elaborated expressly in the privacy cases following *Griswold,* depended on the transformation of the family from a universe of enduring connection to a universe more like the market. Privacy has been valued for centuries, but the notion of privacy as attached exclusively or most fittingly to the autonomous individual is a recent innovation in the history of ideas. It is even more recent with regard to people in families. The position that family members are private, or at least have the *right* to be private, one from another, is fundamentally different from the notion that family privacy should be protected from the larger society and the state. But without that underlying transformation in the way families and family relationships are understood, without the extension of the social and legal world of the autonomous individual into the world of the family, *Eisenstadt* and the "privacy" cases that followed could not have been written.

Commentators and judges have questioned *Griswold*'s use of the word "privacy" to characterize the right recognized there.[175] While the choice of the term was likely motivated by an effort to avoid the sort of direct reference to *Lochner,* which use of the term "liberty" would undoubtedly have compelled,[176] the term "privacy" *does* describe the rights extended in

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172. Michelle Perrot, *At Home, in* 4 A HISTORY OF PRIVATE LIFE 341, 341 (Philippe Aries & George Duby eds., 1990) (citing LITTRE, DICTIONNAIRE (1863-1872)).

173. *Griswold,* 381 U.S. at 483-85. To the extent that the Framers intended to establish a right to privacy, it was only through the Fourth Amendment's protection against unreasonable searches and seizures. *See* SCHWARTZ, *supra* note 91, at 228.

174. *See supra* notes 105-115.

175. *See* Hafen, *supra* note 11, at 525-27 (declaring "the very term 'privacy' as a description for substantive rights an unfortunate source of confusion" and arguing that "[i]f the scaffolding of 'privacy' was necessary to erect a structure of 'liberty,' the scaffolding should now be removed"); Louis Henkin, *Privacy and Autonomy,* 74 COLUM. L. REV. 1410, 1424 (1974) (arguing that "what the Court has been talking about is not at all what most people mean by privacy" (footnote omitted)).

176. Justice Douglas's opinion in *Griswold* makes no reference to liberty nor does it mention specifically the Due Process Clause of the Fourteenth Amendment. Yet the right to privacy, delineated in the opinion, could only reach a state statute by way of the Fourteenth Amendment. Both omissions allowed the Supreme Court to avoid any reference to *Lochner.*

Griswold. In fact, from a social and historical (though perhaps not from a constitutional) perspective, the term "privacy" was a good choice for describing the rights extended in *Griswold*. The family has long been the central arena for private relations in Western society; in contrast, the individual had, at least since the French Revolution, been understood as the agent of "liberty." Privacy, broadly viewed as the "right to be let alone,"[177] describes well the protection *Griswold* apparently grants to the family unit, as such. *Griswold* protects the right to privacy for family relationships and for the family unit, rather than for individuals per se. That right reflected a pervasive perception of family life as private from those outside the family unit that, in one form or another, survived from feudal times.

Eisenstadt protected a distinct right to privacy, in the sense of a "right to be let alone." However, once the right to privacy attaches to the individual outside the context of a larger, structured group, the right itself changes. The shift is fundamental. The traditional privacy of the family is enjoyed *among* people within a unified group; it is the privacy of relationship that excludes those not part of a particular group. Individual privacy, in contrast, does not involve relationship. It depends on and establishes the separateness of the individual as an agent of action and choice. Thus, the extension of privacy to the individual *qua* individual implies the loss of groups such as the family, which previously mediated between the individual and the larger society and, in particular, between the individual and the state.

Once the individual is afforded privacy within familial units, the family is set free from the ideological underpinnings that allowed it to survive relatively intact since feudal times. As a consequence, the right to privacy *becomes* the right to autonomy; the individual within a family becomes essentially no different from the individual anywhere; and families become collections of people who can choose to join, to leave, or to redesign the contours of the unit itself.

See Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293, 306 n.82 (1980) (suggesting that Justice Douglas failed to mention the relevance of his analysis of the liberty interest protected under the Due Process Clause as part of "a studied effort to avoid the stigma of *Lochner*").

"Privacy" and "liberty" are not synonyms, yet they are closely connected. Privacy, in at least one of its connotations, carries a meaning quite close to liberty. This is the sense of privacy as "having nothing to do with public life." THE RANDOM HOUSE COLLEGE DICTIONARY 1054 (rev. ed. 1988). Privacy in this regard suggests the "freedom from external control," *id.* at 772, that connotes liberty. Even here, however, the tone of the two words differs. In common language, privacy also connotes "intimate" and "personal," *id.* at 1054, while liberty suggests "liberties" in the sense of "impertinent, presumptuous or excessively familiar." *Id.* at 772.

177. This definition was provided by Justice Brandeis in his dissent in Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (describing "the right to be let alone" as "the most comprehensive of rights and the right most valued by civilized men").

III. SOME IMPLICATIONS OF THE SHIFT BETWEEN *GRISWOLD* AND *EISENSTADT*

The difference between the apparent messages of *Griswold* and *Eisenstadt* can be seen in the pervasive and basic changes in the family as well as in family law over the past three decades. More importantly, a set of basic moral concerns follows from the transformation of the family into a collection of individuals motivated and identified by the freedom to choose and by the fact of apparently unending choice. These moral concerns[178] suggest a threat to the social foundation of privacy itself. I will place these concerns in an appropriate context in Subpart A in order to discuss them more fully in Subpart B.

A. CHANGES IN FAMILY LAW

In the past several decades, family law has responded to changes in the family and in the society's understanding of the family by significantly altering the definition and regulation of family matters in precisely the direction suggested by *Eisenstadt*. Once the legal system, like the society of which it is a part, began to focus on *individual* family members rather than on the family as an inviolate whole, the rationale for regulating family matters through a separate set of rules and regulations began to evaporate.

These changes reflect the view of family articulated by the Court in *Eisenstadt*. The legal system has so totally re-envisioned the relationship between adults within families that there is often no difference between the regulation of those relations and the regulation of relations in the marketplace.[179] In short, family law (at least as regards the relation between adults) has abandoned tradition almost completely and has amalgamated family law with contract, tort, and property law. The process has occurred rapidly, although not without ambivalence.[180] With regard to children and the parent-child relationship in particular, the law has been slower to sanction shifts away from tradition, but that process is occurring as well. It is riddled with ambivalence, and consequently with contradiction, but it is occurring.

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178. The moral concerns at issue include a set of interconnected considerations about domination within families, about the sort of community that families can provide in a world that attaches ultimate social and moral value to the individual, and about the risks to privacy in a world that locates privacy at the borders of autonomous individuality. For consideration and analysis of these concerns within the context of changes in the family and in family law, see *infra* Part III.B.

179. *See generally* Singer, *supra* note 93, at 1443. Singer recognizes and considers some of the ideological shifts that sustained the changes she describes. She describes a change from public to private ordering in family law. Her article provides an invaluable delineation of the remarkable and widespread changes within family law in the past several decades.

180. *See* Dolgin, *supra* note 1, at 637-42.

1. As Between Adults

Within the past thirty years, family law has permitted the creation and operation of families to become increasingly a matter of negotiation and choice. As between adults, this shift nears completion.[181] For instance, antenuptial agreements in contemplation of divorce, dismissed by courts everywhere only twenty-five years ago as violative of state public policy, are now widely recognized and enforced.[182] Moreover, in enforcing premarital agreements, courts largely rely on principles of standard contract law.[183] The law has further begun to consider contracts between couples that define their ongoing relationship.[184] An even more remarkable illustration of the extent to which the universe of contract has entered and redesigned the marriage relationship within the society as a whole is the appearance of family counselling techniques that use "contracting" between family members as a therapeutic approach.[185] That "contract" has become both the metaphor and the tool, among lawyers and social workers alike, for constructing and repairing marriages indicates the extent to which married couples are envisioned as separate individuals, free to choose not only the association of marriage itself, but its terms and boundaries.

The same process of defining and treating the family as a collection of

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181. This should not be taken to imply that a great deal of change is not ahead. The change continues far more easily, however, than the comparable process involving the regulation of children within families. *See infra* notes 192-209 and accompanying text.

182. *See, e.g.,* Posner v. Posner, 233 So. 2d 381 (Fla. 1970); Osborne v. Osborne, 428 N.E.2d 810 (Mass. 1981); Scherer v. Scherer, 292 S.E.2d 662 (Ga. 1982). Several of the early decisions that recognized antenuptial agreements in contemplation of divorce justified their decisions because of shifts in the character of the family and in the frequency of divorce. In *Posner,* the court took judicial notice of the increase in the ratio of marriage to divorce within the society.

183. *See* Doris J. Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview,* 22 FAM. L.Q. 417 (1988). Generally states enforce antenuptial agreements if they are "(1) free from fraud and overreaching, (2) reflect a full and fair disclosure by and between the parties of their respective assets, and in some states, (3) not unconscionable as to property division or spousal support." *Id.* at 560.

The Uniform Premarital Agreement Act provides for antenuptial agreements about property divisions and "any other matter, including . . . personal rights and obligations, not in violation of public policy or a state statute imposing a criminal penalty." *See* The Uniform Premarital Agreement Act, § 3, 9B U.L.A. 373 (1987). The commentary to section 6 provides that in interpreting such agreements courts should use the standard of unconscionability applied by commercial law. *Id.* § 6, at 376.

Some states apply a substantive fairness review to antenuptial agreements that is not applied to commercial contracts. *See, e.g.,* Warren v. Warren, 523 N.E.2d 680, 683 (Ill. Ct. App. 1988). Other states will not enforce antenuptial agreements if they interfere with the support of a spouse following divorce. *See, e.g., In re* Marriage of Winegard, 278 N.W.2d 505, 512 (Iowa 1979).

184. *See, e.g.,* The Uniform Premarital Agreement Act, § 3 & cmt., 9B U.L.A. 371, 373-4 (1987) (permitting couples to specify certain aspects of character of marriage in antenuptial agreement).

185. *See* Singer, *supra* note 93, at 1461.

separate individuals rather than as a unit of social value beyond the individuals involved, appears in laws that define and regulate divorce. With the so-called "divorce revolution," states began in the late 1960s[186] to permit divorce upon agreement of the parties: no-fault divorce. Previously, divorce was available, not because the parties *chose* to separate, but because the state deemed the actions of one party to the marriage so aberrant as to render the relationship nonexistent.[187] Along with the shift from fault to no-fault divorce has come a set of procedural changes making it far easier for couples to divorce.[188] Thus, the law has increasingly transferred its responsibility for regulating marriage and divorce to the parties involved.[189] In consequence, no-fault divorce, as Mary Ann Glendon notes, is also "no-responsibility" divorce—at least no responsibilities enforced by legal sanction.[190]

Social and legal recognition that the spousal relationship is no longer defined by an encompassing universe of status-based rights and obligations is further indicated by the increasing willingness of courts and legislatures to recognize cohabitation agreements between parties never formally married.[191] These agreements suggest that couples who choose not to marry may determine the financial and other consequences of a potential separation just as business partners may determine the consequences of their firm's dissolution.

Thus, the American legal system has practically come to view adult family members as business associates, free to negotiate the terms of relationships and the terms of their demise. With regard to children and to the parent-child tie, the legal system has been reluctant to sanction the amalgamation of family law with the laws of the market. But, even here, that shift is occurring.

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186. In 1969, California was the first state to provide for no-fault divorce. *See* Act of Sept. 4, 1969, ch. 1608, 1969 Cal. Stat. 3312. Within a decade, almost every state provided for some sort of divorce that at least lessened the need for accusations of fault between the parties. *See generally* Doris Jonas Freed, *Grounds for Divorce in the American Jurisdictions (as of June 1, 1974)*, 8 FAM. L.Q. 401 (1974) (listing grounds for divorce by state).

187. Under the laws that permitted divorce only upon accusations of fault, grounds included such acts as adultery, willful desertion, and absence long enough to lead to a presumption of death. FRIEDMAN, *supra* note 103, at 204-07.

188. A small number of states now provide for summary dissolution proceedings that generally require no divorce hearing at all. ELLMAN ET AL., *supra* note 95, at 192. Such procedures are usually available only to couples without minor children. *Id.*

189. *See* Singer, *supra* note 93, at 1470-74. Again, the crucial move from the law's perspective has been the transformation of "family law" into a branch of contract and tort—and to some lesser extent property—law.

190. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 104-05 (1987).

191. *See, e.g.*, Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976) (enforcing nonmeretricious contracts between domestic partners); Morone v. Morone, 413 N.E.2d 1154, 1157 (N.Y. 1980) (sustaining an express contract between nonmarried persons); MINN. STAT. § 513.075 (1988) (Cohabitation: Property and Financial Agreements).

2. Changes Involving Children and the Parent-Child Tie

Perhaps nowhere is the pressure to redefine the essence of the parent-child connection stronger than in cases involving reproductive technology. To date, the legal system's response to the dilemmas posed by reproductive technology has been ambivalent and confused.[192] Surrogacy cases[193] and cases involving the status and fate of frozen germinal material[194] are testing the limits of family law's view of parents and their children. These cases question traditional assumptions about the biological basis of parenthood and, at the same time, transform the process of becoming a parent into a matter of consumer choice.[195] Recently, in *Johnson v. Calvert*,[196] the California Supreme Court enforced a surrogacy agreement between a gestational surrogate and the intending, genetic parents, contrary to the surrogate's desire to keep the baby she had gestated and delivered. The trial court in the case, challenging deeply ingrained assumptions about what makes a mother a mother,[197] described the gestational surrogate as a "gestational carrier" but a "genetic hereditary stranger" to the child.[198]

By subdividing both the biological processes that constitute parenthood[199] and the previously continuous biological processes through which children are produced,[200] reproductive technology forces the society and the law to face squarely basic questions about the essence of the parent-

192. *See* Dolgin, *supra* note 1, at 672-94.

193. *In re* Baby M, 537 A.2d 1227 (N.J. 1988) (adjudicating a contract and custody dispute between the surrogate mother and genetic father).

194. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 113 S. Ct. 1259 (1993) (considering the moral status and legal fate of seven frozen embryos that became the subject of divorce proceedings between the gamete donors).

195. *See* Dolgin, *supra* note 23, at 548-50.

196. 851 P.2d 776 (Cal. 1993).

197. Legislative bodies, both in the United States and elsewhere, have largely defined motherhood as stemming from the gestational, rather than the genetic, aspects of biological maternity. *See* Karen H. Rothenberg, *Gestational Surrogacy and the Health Care Provider: Put Part of the "IVF Genie" Back Into the Bottle*, 18 LAW, MED., & HEALTH CARE 345, 346 (1990).

198. Johnson v. Calvert, No. X-633190 (Cal. App. Dep't Super. Ct., Oct. 22, 1990), slip op. at 5, *aff'd sub nom.* Anna J. v. Mark C., 286 Cal. Rptr. 369 (Ct. App. 1991), *aff'd sub nom.* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); *see* Dolgin, *supra* note 1, at 684-89 (analyzing the law's response to gestational surrogacy).

199. Gestational surrogacy, for instance, whereby one woman gestates and gives birth to a baby produced from the zygote of gamete donors, involves two women with biological claims to maternity. Both the surrogate, in whose uterus the fetus develops, and the egg donor, who provides the genetic material from which the fetus is created, participate in the process that has been understood to constitute biological maternity. *See* Dolgin, *supra* note 1, at 684-94.

200. Previously, the biological process that began with conception and concluded with the birth of a child was continuous. That is no longer necessarily so. Ova and sperm can now be united *in vitro*. The fertilized egg can then be cryopreserved (frozen) in a laboratory and implanted in a woman's uterus years later. The period during which it is possible to preserve a zygote between fertilization and implantation increases continually. Eventually it may become possible, for instance, for a woman to gestate a zygote produced from an egg donated by her own great-grandmother. Alise R. Panitch, Note, *The* Davis *Dilemma: How to Prevent Battles Over Frozen Preembryos*, 41 CASE W. RES. L. REV. 543, 548 (1991).

child tie. Moreover, the dilemmas and confusions facing the legal system in cases that involve reproductive technology reflect, with especial intensity, a set of conundrums about the moral and legal status of children, and about the definition of the connection between children and parents, which face the society and the law more generally.

Adoption, for instance, long designed to reflect the model of the nuclear family composed of married parents and their biological children, is now changing.[201] For the common law, the significance of biology in the definition of family precluded the recognition of adoptive families.[202] By the late nineteenth century, statutory law provided for adoptive families in the United States and in Great Britain, and by the twentieth century, such families were afforded real protections by the law.[203] To some extent, the legal recognition of adoptive families represented an early acknowledgement that the love and intimacy of the parent-child relationship need not be anchored in biology. For decades, however, the law continued to insist that adoption be structured "in imitation of biology."[204] Now, open adoptions in which biological and adoptive parents join together in parenting a child have become increasingly acceptable.[205] In part, the move toward unsealing adoption records represents a similar trend. However, both open adoptions and the so-called "search movement," which advocates unsealing adoption records,[206] can be (and are being) read to support contradictory conclusions about the essence of the family. On the one hand, these trends are variously applauded or condemned by some as suggesting that no one model need dictate how families are established. On the other hand, the same trends are read, and with equal strength applauded or condemned, by others to indicate that biology *is* basic. Thus, the ongoing debate about how the law should define and regulate adoption dramatically illustrates the society's deep ambivalence and its confusions about changing definitions of family.

Recent cases of children attempting to "divorce" their biological parents illustrate dramatically the scope of potential shifts in the meaning of the parent-child tie and in the status of children. In one Florida case, a ten year old boy hired a lawyer to help him terminate his biological mother's parental rights and to effect his adoption by the family that had been housing him as a foster child.[207] That case is significant not only because it

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201. *See* ELIZABETH BARTHOLET, FAMILY BONDS 55-61 (1993) (describing a trend toward informational openness regarding adoption and suggesting that adoption be understood as a distinct and "valid family form").

202. *Id.* at 170.

203. *Id.*

204. *Id.*

205. *See generally* LINCOLN CAPLAN, AN OPEN ADOPTION (1990).

206. BARTHOLET, *supra* note 201, at 171-72.

207. *In re* Kingsley, 1992 WL 551484 (Fla. Cir. Ct. Oct. 21, 1992), *aff'd in part and rev'd in*

provides a potential parallel to no-fault divorce[208] in the context of the termination of parental rights, but also because the legal system recognized the child and his relation to his parents in terms of contract, rather than biological status. The trial court acknowledged that the boy was an autonomous individual able to engage an attorney and to initiate the legal process that would define his own parentage.[209]

Thus, it appears that even the inviolate core of the family unit, the parent-child tie, is subject to the pressures of encroaching individualism in ways that would have been practically unimaginable twenty-five years ago. The process of change in the parent-child tie is occurring more slowly and amidst much stronger emotion, confusion, and opposition than the parallel process for relations between adults. But even here, at the core of the traditional family unit, the vision of the family suggested by *Griswold* is being replaced with that suggested by *Eisenstadt*.

B. MORAL IMPLICATIONS

The demise of the family as a structured hierarchy, anchored in the natural 'facts' of shared biological substance, creates at least three separate areas of moral concern. The first concern is for relationships within families. For instance, will the inequalities of the ancient family form—inequalities grounded in, and justified by, their inevitable reflection of natural fact—be eradicated, or only transformed, in a world that understands the family as a collection of individuals connected only by some combination of choice and the contingencies of everyday life? The second concern is for the definition and character of families in general—for the kind of community that families can provide. For instance, will the family continue to be understood as a domain of enduring love and unequalled solidarity in a world that allows families to be created through the mecha-

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part sub nom. Kingsley v. Kingsley, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993). The boy's lawyer was his foster and potential adopting father. *See also* Booth, *supra* note 74, at A1.

208. The importance of this case did not lie, as the media framed it, in the creation of a "divorce" action between parents and their children. The boy, Gregory Kingsley (later known as Shawn Russ) argued that his biological mother's parental rights should be terminated because she was unfit to be a parent. In that sense, the case represented only a transformation of an abuse or neglect petition. However, the trial court's decision for the boy—resulting in the termination of the biological mother's rights and in Gregory's adoption by his foster parents—was significant because it made possible the right in the future for children to initiate termination and adoption actions. Martin Guggenheim, *Gregory's Win Might Be a Loser,* NEWSDAY, Oct. 5, 1992, at 36.

The trial court decision was partially reversed on appeal. Kingsley v. Kingsley, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993). A Florida court of appeal held that Gregory, because still a child, did not have legal capacity to commence the termination proceeding. The error was held to have been harmless, however, because four other parties with capacity filed petitions on the boy's behalf requesting termination of Gregory's biological mother's parental rights. *Id.* at 790.

209. *In re* Kingsley, 1992 WL 551484 (Fla. Cir. Ct. Oct. 21, 1992), *aff'd in part and rev'd in part, sub nom.* Kingsley v. Kingsley, 623 So. 2d 780 (Fla. Cir. Ct. 1993); *see supra* note 208.

nisms of contractual exchange? The third concern is for the sort of privacy defined in *Griswold* and redefined in *Eisenstadt*. Is privacy more seriously threatened than ever before when it is located at the limits of autonomous individuality? These three sets of concerns are interconnected and will therefore be discussed together.

Each of these moral concerns is connected to a change in the way social and moral value is attached to people in society. *Lochner* and *Eisenstadt* alike attached social and moral value to the autonomous individual. *Lochner,* however, placed that individual in the marketplace, while *Eisenstadt* placed the individual at home. *Griswold,* on the other hand,[210] attached social and moral value to the family as a complete unit that encompassed people in relationships.[211]

By noting how various societies attach moral value, anthropologist Louis Dumont distinguishes societies as primarily holistic or individualistic in their organizing social structures and ideologies. Dumont suggests that traditional societies[212] are holistic in the sense that the whole, generally organized hierarchically,[213] is conceptually unified. In traditional caste India, for example, this unification occurred through the religious opposition between pure and impure. Dumont argues that the "conceptual reality" of traditional caste society lies in that opposition and not in the separate, hierarchically organized castes.[214] Dumont writes:

> On the one hand, most societies value, in the first place, order: the conformity of every element to its role in the society—in a word, the society as a whole; this is what I call "holism." On the other hand, other societies—at any rate ours—value, in the first place, the individual human being: for us, every man is, in principle, an embodiment of humanity at large, and as such he is equal to every other man, and free. This is what I call 'individualism.'[215]

Thus, the transition from feudal forms to modern forms[216] has been a

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210. *See supra* notes 106-108 and accompanying text (describing differences between text and subtext of *Griswold* opinion).

211. Anthropologist Louis Dumont distinguishes two meanings of the term individual person: first is the "*empirical* subject of speech, thought, and will," present in all societies; second is "the independent, autonomous, and thus (essentially) non-social *moral* being, as found primarily in our modern ideology of man and society." DUMONT, *supra* note 2, at 8.

212. Louis Dumont lists caste India, ancient China, ancient Japan, and ancient Greece as examples of traditional societies. *Id.* at 8-10.

213. Dumont argues that holism and hierarchy tend to be connected—just as individualism and an egalitarian ideology tend to be connected—but various holistic societies stress hierarchy to different degrees just as various individualistic societies stress egalitarianism to different degrees. *Id.* at 4.

214. Dumont, *Caste, supra* note 36, app. at 251.

215. DUMONT, *supra* note 2, at 3-4.

216. That transition emerged clearly in about the year 1300. Herlihy, *supra* note 16, at xi. The transition was largely complete with the Industrial Revolution, but did not until much more recently directly affect the form of the family.

transition from holism to individualism and from ideologies that stress hierarchy to ideologies that stress egalitarianism.[217]

Until recently, the family represented one of the few instances in the modern world of a sphere of life that reflected a holistic, hierarchical origin more than it reflected the individualism that had so largely replaced holism and hierarchy in the West.[218] Holistic and hierarchical ideology sanctioned deeply ingrained inequalities, but also fostered a sense of responsibility anchored in the dictates of natural and sacred truth. Thus, the traditional family provides an unequalled model of responsible community in the modern world, but it also provides a model of a community that justifies and prizes inequality.[219] To determine how (if at all) the first can exist without the second is one of the most important moral tasks of our time.[220]

The individualistic model of family that forms the core of *Eisenstadt*'s equal protection argument—the argument that the Constitution demands that states treat married and unmarried people alike—assumes a family unit anchored in autonomous choice rather than in the inevitability of relationship. Such a unit tends to sacrifice community for independence. Within this new family unit, connection is effected through the same sort of contractual negotiations that have for so long effected connections in the marketplace. Such connections are safeguarded, not by the innate character of relationship, but by the ability of the parties concerned to

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217. This was one of Karl Marx's insights in his analysis of the development of capitalism. *See* KARL MARX, CAPITAL *in* 50 GREAT BOOKS OF THE WESTERN WORLD 31-37 (Robert M. Hutchins ed., Samuel Moore & Edward Avelins trans., 1977) (1867) (discussing "The Fetishism of Commodities and the Secret Thereof"); *see also* BARNETT & SILVERMAN, *supra* note 87, at 41-81 (discussing the implications of the transition for the character of and differences between class domination and patriarchal domination in modern society).

218. This does not, of course, mean that people *are* equal in the West, but that the ideology of the West says they should be equal. The egalitarian ideology prizes equality, whereas the ideologies of caste India and feudal Europe prize hierarchy. Instances of hierarchy can be found in the West (e.g., racism) just as instances of equality could be found in traditional, hierarchical societies (e.g., the renouncer in traditional caste India). *See* Dumont, *Caste*, *supra* note 36, at 231-34.

219. *See* Frances Olsen, *The Politics of Family Law*, *in* FAMILY MATTERS, *supra* note 17, at 338-39 (delineating various legitimations of hierarchical family form).

220. Calls for responsible community grow. Hillary Rodham Clinton's "politics of meaning" refers primarily to a political agenda that places caring and community at its center. Michael Lerner, *Counterpoint: The Meaning of the Politics of Meaning*, WALL ST. J., June 3, 1993, at A15. Lerner, a self-proclaimed liberal, argues that the concern of those on the political right with the "crisis in families and the decline in values" refers to real problems. In his view, however, the solution of the right was "a fantasy of an ideal community and ideal family that had no reality in people's daily lives." *Id.*

Despite the agreement between the political left and the political right as to the problem, no one seems able to describe convincingly the relation between individual and group in terms of which such responsible communities can be created or, more to the point, sustained.

bargain a good deal. And if the connection fails, they may sue for breach of contract or in tort.

Such families are associations like any others, and the parties who compose them are neither shackled nor reassured by ancient truths that once made relationship seem inevitable. So, it is not surprising that the law does not—and probably cannot—regulate such families through traditional rules. The society's view of the family has changed, and with it the law's response. The strong common-law position that favored family privacy, and accordingly protected the family from "state intervention," makes no sense, even as an argument, when the family as such is no longer viewed as a unit of social value apart from and encompassing the individuals who compose it.[221] As the family is increasingly viewed as a collection of discrete individuals, the law will intervene or not, depending on the merit of the claims involved, just as it does in business or other social affairs between people.[222] But its response will not be explained as either an effort to protect, or to avoid interfering with, the family as a conceptual whole.

The view of the family portrayed in *Eisenstadt,* therefore, produces a profound social and political consequence: the family as a mediating institution between the individual and the state ceases to exist. Indeed, the process of defining privacy so that it attaches to the individual *is* the process of discarding social mediators. A parallel process characterized the ideological shifts that transformed the feudal order more generally in an earlier day.[223]

The privacy the Court has granted to the autonomous individual may be a dubious privilege. Defining the individual as private may inevitably entail severing the bonds of enduring community that elsewhere connect people to each other. If each person is entirely private, connection can never be assumed. Various ties can be chosen, negotiated, and effected, but such ties are not enduring, solidaristic, or diffuse, as they were in the American family described by Schneider in 1965.[224]

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221. Francis Olsen is perfectly correct in declaring that "[s]tate intervention in the family is an ideological, not an analytic concept." Olsen, *supra* note 17, at 281. The state, for example, intervenes simply by defining contexts when it cannot otherwise intervene.

222. Presumably, the state will continue to intervene to protect children abused or neglected by their parents, for instance, but such intervention will probably be viewed increasingly less often as an exception to a general stance of state nonintervention.

Francis Olsen has compared arguments for state nonintervention in the family with a laissez-faire position in the context of the market. *Id.* at 277-78. In both contexts, she argues, one's view of what constitutes intervention depends on one's political agenda. *Id.*

223. An example of the same shift in the religious order is found in the move from the holistic, hierarchical universe represented by Catholicism to the individualistic world of Protestantism that, at least in theory, permits the individual direct access to his or her divinity. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 19 (Talcott Parsons trans., 1958) (1904-05).

224. *See generally* SCHNEIDER, *supra* note 19.

Privacy, defined as a right attached to the autonomous individual rather than as an aspect of relationship—the privacy of the person separate from all other persons[225]—may produce a far more disturbing, "involuntary" consequence: totalitarianism.[226] Totalitarian societies, such as Nazi Germany, do not prize holism. Rather, they associate individualism exclusively with the social whole. Totalitarian societies differ from hierarchical, holistic societies (such as feudal Europe or caste India). In the former, the social whole is understood through the metaphor of the individual; in the latter, it is understood as a structured interconnection of parts (e.g., castes).[227] As Dumont asserts, "[T]otalitarianism results from the attempt, in a society where individualism is deeply rooted and predominant, to subordinate it to the primacy of the society as a whole."[228] Within such a world—a world in which the state itself is envisioned through the metaphor of the individual—privacy, as we know it, dissolves. That this pattern is found, though only intermittently, in nontotalitarian individualistic societies emphasizes the danger.

The right to privacy, unlike other rights protected by the Constitution such as equality, has an ancient history.[229] Privacy as an aspect of relationship, as a fact and as a privilege of status groups such as the family, was assumed and thus protected by society long before *Griswold*.[230] The social locus of privacy has steadily shifted over the course of the last few hundred years from the group to the individual, but privacy has been valued in the West (and elsewhere) for many centuries. Indeed, at present, privacy may be protected less fully than it once was. The strength and scope of the protection afforded by the constitutional right to privacy remain uncertain, but two assumptions of the society and its legal system on which protections were previously based have been challenged: (1) that the family constituted a mediator between the person and the state; and (2) that, therefore, family privacy was sacrosanct. Traditional notions of family

225. *See* Dailey, *supra* note 60, at 981 (1993) (describing family privacy as "antithetical" to individual privacy).

226. DUMONT, *supra* note 2, at 12. In delineating the "involuntary consequences of egalitarianism," Dumont refers to those developments within the egalitarian, individualistic world that seem to contradict that world's egalitarian ideology. Totalitarianism is one such example. Racism is another. *Id.* at 11-12; *see also* Dumont, *Caste, supra* note 36, at 254-58.

227. *See* Steven Barnett, *Identity Choice and Caste Ideology in Contemporary South India, in* SYMBOLIC ANTHROPOLOGY, *supra* note 18, at 281-83 (describing transition from caste to ethnicity in South India).

228. DUMONT, *supra* note 2, at 12 (emphasis omitted).

229. Indeed, the majority opinion in *Griswold* referred to privacy as a right "older than the Bill of Rights—older than our political parties, older than our school system." *Griswold,* 381 U.S. at 486.

230. *See supra* notes 48-51 and accompanying text (describing privacy as a value attached to groups rather than to individuals during earlier historic periods).

privacy dissolve, while the extent of the protections afforded individuals to design their own intimate lives remains unclear.[231]

Not surprisingly, a lack of social consensus about the likely consequences of the disintegration of the traditional family is reflected in the legal system. Indeed, after *Eisenstadt,* the Court did not abandon the rhetoric of familial privacy entirely; rather, it returned to that rhetoric in a number of cases. For the most part, the Court did so to safeguard from constitutional attack statutes that defined and regulated the family in traditional terms—terms that precluded the individual from freely negotiating the parameters of family connection. For instance, in *Bowers v. Hardwick,*[232] the Court upheld a Georgia sodomy statute, finding no link between the "claimed constitutional right of homosexuals to engage in acts of sodomy" and the privacy protections afforded traditional families.[233] Similarly, in *Michael H. v. Gerald D.,*[234] Justice Scalia, writing for the Court, referred to "the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."[235] The Court upheld, against the claims of a putative biological father, a California statute that presumed "the issue of a wife cohabiting with her husband, who is not impotent or sterile" to be "a child of the marriage."[236]

However, the Court's references to family tradition and family solidarity in cases like *Hardwick* and *Michael H.*[237] can no longer be read as an invocation of assumed and widely shared truths. As the dissents in those cases make clear, the Court's rhetoric, like its holdings, only represents one choice.[238] In response, the California legislature amended the statute at issue in *Michael H.* to allow a putative father to rebut the presumption

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231. The danger to privacy is increased enormously by technological advances such as the ability to use and decipher genetic material, the development of computers, listening devices, telephoto lenses, and the refinement of machines that can measure physiological responses. *See* DWIGHT C. TEETER & DON R. LEDUC, MASS COMMUNICATIONS 248 (1992) (noting that in "the information society" it is increasingly difficult to keep information about oneself private); HARVEY L. ZUCKERMAN ET AL., MASS COMMUNICATION LAW IN A NUTSHELL 116 (1988) (describing technological inroads into personal privacy); *see also infra* notes 232-236 and accompanying text (describing recent Supreme Court cases that abandon rhetoric of individual privacy in favor of a return to family privacy).

232. 478 U.S. 186 (1986).

233. *Id.* at 191.

234. 491 U.S. 110 (1989).

235. *Id.* at 123.

236. *Id.* at 115 (quoting CAL. EVID. CODE § 621(a) (West Supp. 1992)). The statute allows rebuttal of its presumption by the husband or the wife, under limited circumstances; the putative biological father has no right to rebut the presumption. *Id.*; *see also* Dolgin, *supra* note 1, at 663-72 (analyzing courts' attempts to define "father").

237. *See, e.g.,* Michael H. v. Gerald D., 491 U.S. at 142-47 (Brennan, J., dissenting) (discussing marriage as the critical factor in the plurality's denial of protection of an unwed father's relationship with his daughter).

238. *See Paternity,* 16 FAM. L. REP. 1520, 1520 (1990).

of the mother's husband's paternity by bringing a motion within two years of the child's birth. And that fact alone—the fact of legislative choice in defining and regulating families—reflects precisely the shift represented by *Eisenstadt*.

Thus, at present, individuals have been given the right in many contexts to define their own reality and thus to fashion the terms of intimate relationship just as they can fashion the terms of a business deal. The intense ambivalence of the society and the legal system about the transformation of the family from a private realm of ordered relationships to a collection of autonomous individuals is reflected in the Supreme Court's conflicting declarations and confused jurisprudence about privacy.[239] Traditional assumptions that families are private and therefore best provide for their members without governmental interference (at least most of the time) can no longer be taken for granted. At the same time, however, the protections afforded the individual in cases such as *Eisenstadt* and *Carey*[240] have not always been reinforced in subsequent decisions.

For similar reasons that stem from the transformation of the family, individuals may abuse privacy more easily than before. Barrington Moore refers to such abuse as the "pathology of privacy."[241] For example, this phenomena includes examples of urban Americans who fail to aid distressed neighbors or wreak havoc themselves, and then invoke their privacy as a justification for destructive behavior. The absence of communal mediators such as the family—an absence implied by *Eisenstadt*—leaves people without a sense of ultimate responsibility within, and toward, any social group. Once the unattached individual is seen as the paradigmatic moral agent, the community ceases to dictate a morality of relationship. And once that happens, each individual is *presumed* to oppose all others equally, and no community is available to intervene.

CONCLUSION

At least since the late eighteenth century, the family, almost alone among Western institutions, stood steadfastly apart from the marketplace with its view of people as equal, autonomous individuals. At home, people related to each other because the moral dictates of inexorable truth gave them no choice. At home, people were not free to negotiate the terms or

239. This claim is not necessarily meant to imply that any one Justice is confused or ambivalent—although that is sometimes the case as well. Rather, the ambivalence of the society as a whole about the dramatic changes affecting the family are reflected in the various and often conflicting opinions of the government and the judiciary. Thus, the claim that the judiciary is ambivalent is asserted as a general, social description, not as a description of any particular Justice.

240. Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (finding a New York statute preventing sale of contraceptives to minors unconstitutional).

241. BARRINGTON MOORE, JR., PRIVACY 275 (1984).

the duration of their interactions. And at home, family members were neither putatively nor actually equal. Thus, the home and the family represented a remarkable vestige of an earlier world in which people were who they were because they were born to be that way, a world in which the social whole had a moral value that included, but only by encompassing, individual people. Not surprisingly, the legal system reflected the special, almost sacred, parameters of that world. For hundreds of years, family law was distinct in practically every regard from the law that regulated the rest of contemporary life.

About thirty years ago, the legal system began to reflect the erosion of the family as an ancient universe anchored in sacred truth. Today, family law has merged in large part with contract and tort law. The process and its results are obvious with respect to the law's treatment of adult family members. As regards children and the relationship between children and their parents, the process moves more slowly and more ambivalently. But it is occurring there as well.

These changes are represented dramatically in a comparison of *Griswold,* the first case in which the Supreme Court expressly recognized a constitutional right to privacy, and *Eisenstadt,* in which the Court transformed the familial privacy apparently protected in *Griswold* into an individual right. By defining privacy as an individual right, applicable in the home as much as in the market, *Eisenstadt* defined family connection as a matter of transient choice.

In consequence, people become free to design their own realities within the home, just as they have been free within the market. They are no longer tightly bound by the family as a moral community that dictates the terms of decent behavior. This transformation means that individuals are no longer tightly bound by family hierarchy, which for centuries in one form or another defined women and children as less than fully human. But, at the same time, the enduring connections that anchored people to one another within the family become, like the connections of the market, the contingent connections of negotiation and choice.

The moral crisis is evident. The fate of the family is not. It remains unclear how the morality of a universe of status—sanctioning significant inequalities, but providing for enduring relationships—can be replaced with a morality that values equality and individuality while continuing to anchor people in a social order that encourages responsible connection.