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# Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection

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# Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection

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*In this Article, Professor Baker analyzes how and why the law protects both horizontal (marital) and vertical (parent/child) relationships. In doing so, she suggests that, although the reasons to protect relationships are comparable in both the horizontal and vertical contexts, the law is much more willing to interfere with vertical relationships, at least when the parents are not married to each other. From the standpoint of women's needs, this inconsistent treatment of relationships is precisely backwards. Women benefit little from the law's deference to horizontal relationships, but they could benefit substantially if the law was more deferential to a single parent's relationship to her child. To help alleviate the harms caused by the law's willingness to interfere with vertical relationships, Baker suggests using paradigms from traditional property law as a means of reorienting the law's treatment of relationship. Although feminist scholarship often resists the sometimes arcane and rigid rules of property, Baker argues that property law's acceptance of hierarchy, reliance on investment, and respect for boundary will better protect women's interests than does contemporary family law doctrine.*

## I. INTRODUCTION

If property rights reflect relationships between people, then relationships between people may well reflect property rights. On its face, this seems to be a fairly straightforward syllogism. In practice, the law has proved remarkably resistant to the logic, particularly in the family context. The law's reticence to treat family relationships as property relationships most likely stems from a belief that such treatment would reduce the intrinsic worth and enriching nature of familial connection. Treating relationships as resources to which people have private entitlements<sup>1</sup> increases the likelihood that those resources will be perceived as

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<sup>1</sup> Bentham wrote that property was "nothing but a basis of expectation." JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 111 (C.K. Ogden ed., Kegan Paul, Trench, Trubner & Co. Ltd. 1931) (Richard Hildreth trans., 1864). Calabresi and Melamed championed the term "entitlement." See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972) ("The first issue which must be faced by any legal system is one we call the problem of 'entitlement.'").

commodities subject to market transactions.<sup>2</sup> Reducing familial relationships to such market analysis is thought by many to foster an inferior concept of human flourishing.<sup>3</sup> Property constructs have many advantages in the family context, however.<sup>4</sup> Property paradigms bring with them notions of hierarchy and investment that can help us define what a family is and notions of boundary and autonomy that can help us determine what a family is not. Property's symbolic association with boundaries and autonomy<sup>5</sup> also correlates with a long tradition of legal deference to the family relationship. The family, as a bounded entity,<sup>6</sup> has been, and arguably needs to be, treated as a unit unto itself, not a mere collection of

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<sup>2</sup> Marketability often brings with it rhetoric of fungibility, alienability, and cost-benefit analysis that offends many peoples' normative conception of family. For the ways in which market rhetoric affects our conception of ourselves and those around us, see Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1885-86 (1987) ("[T]o see the rhetoric of the market—the rhetoric of fungibility, alienability, and cost-benefit analysis—as the sole rhetoric of human affairs is to foster an inferior conception of human flourishing."). See also ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993) (discussing the ethical limitations of the marketplace). For a critique of how the failure to use market rhetoric in the family context devalues the work that women do, see Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997).

<sup>3</sup> See Radin, *supra* note 2, at 1885-86.

<sup>4</sup> To the extent that thinking about family relationships as property entitlements runs the risk of diminishing the uniqueness of those relationships, it is important to remember that property entitlements need not be viewed as commercial entitlements. Property entitlements often manifest themselves in non-market contexts. See Carol M. Rose, *Rhetoric and Romance: A Comment on Spouses and Strangers*, 82 GEO. L.J. 2409, 2418 (1994) ("Property may be implicit in the patterns [of behavior] governing who gets what in the most intimate of relationships. It is equally implicit in the series of informal trades and 'even-up' relationships among neighbors who do favors and services for each other . . ."). Most scholars of property rights and rhetoric accept the normative propriety of a property system that includes both alienable and inalienable entitlements. See Radin, *supra* note 2, at 1857-58 (stating that on the continuum between Karl Marx's noncommodification, see KARL MARX, *Economic and Philosophic Manuscripts of 1844*, in THE MARX-ENGELS READER 66, 70 (Robert C. Tucker ed., 2d ed. 1978), and Richard Posner's omnicommodification, see RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 29-33 (2d ed. 1977), lie the "pluralists—those who see a normatively appropriate but limited realm for commodification coexisting with one or more nonmarket realms"). It is also important to remember that not all family relationships are sources of enrichment or intrinsic worth. Some marriages need to end. Many parental relationships exist in name only. Our willingness to accept property rhetoric may depend on how valuable the relationships are to the parties involved.

<sup>5</sup> See Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 17 (1989) (Historically, "[i]ndividual autonomy was conceived of as protected by a bounded sphere—defined primarily by property—into which the state could not enter.").

<sup>6</sup> For further discussion of why the law must treat the family as an entity, see Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865 (1989).

individuals.<sup>7</sup> Property rhetoric encourages such treatment because it facilitates an image of the family as an independent entity into which the law should penetrate only rarely.

Traditionally, family relationships were treated as property relationships, with the husband and father essentially “owning” his wife and children.<sup>8</sup> For the most part, the law has discarded these old property constructs. Now, familial connection gives rise not so much to property interests as to some form of right.<sup>9</sup> Legal protection of family relationships, in the form of both negative and positive rights, extends to both horizontal and vertical relationships. Horizontal relationship rights are those that extend to consenting adults who choose, through marriage, to define themselves as a family. Horizontal relationship rights include the negative constitutional right to privacy<sup>10</sup> and the common law doctrine of family autonomy.<sup>11</sup>

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<sup>7</sup> For a contrary view, that is, that the family is now viewed as nothing other than a collection of individuals, see Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1522 (1994) (arguing that *Eisenstadt v. Baird*, 381 U.S. 479, marked a watershed change in legal doctrine because it “expressed and extended to individual family members the ideology of autonomous individualism”).

<sup>8</sup> See NORMA BASCH, *IN THE EYES OF THE LAW* 17–20 (1982); MICHAEL GROSSBERG, *GOVERNING THE HEARTH, LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA*, 234–36 (1985); MARY ANN MASON, *FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS* 6 (1994).

<sup>9</sup> “[A] natural parent’s desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right.” *Santosky v. Kramer*, 455 U.S. 745, 749 (1982) (quoting *Lassiter v. Department of Soc. Serv.*, 452 U.S. 18 (1981)). *Santosky* addressed the question of what standard of proof was required before the state could terminate parental rights on grounds of abuse and neglect. *Lassiter* involved the right of a parent to counsel subject to such proceedings.

There have been many recent calls to dispense with the rhetoric of rights, particularly in the family law area. See MARY ANN GLENDON, *RIGHTS TALK* (1991); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 14 CARDOZO L. REV. 1747 (1993). This Article argues that dispensing with rights rhetoric at this point could do women a disservice. As Martha Minow has argued, rights can be a very powerful tool in the hands of people who, by “claiming rights[,] implicitly invest themselves in a larger community, even in the act of seeking to change it.” Martha Minow, *Re-Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1874 (1987). For women in families, “there is something too valuable in the aspiration of rights and something too respectful of the power embedded in the assertions of another’s need, to abandon the rhetoric of rights.” MARTHA MINOW, *MAKING ALL THE DIFFERENCE* 307 (1991).

<sup>10</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (holding that the Bill of Rights guarantees certain “zones of privacy”).

<sup>11</sup> See *Doe v. Doe*, 314 N.E.2d 128, 132 (Mass. 1974) (“[O]ur law has not in general undertaken to resolve the many delicate questions inherent in the marriage relationship.”); *Maguire v. Maguire*, 59 N.W.2d 336, 341 (Neb. 1953) (holding that a state can not interfere in how to allocate finances between a married couple). Interspousal immunity doctrine and spousal

Vertical relationship rights are parental rights with regard to children. They have both a negative and positive component. Negatively, parental rights give married parents the right to raise and socialize their children as they choose without interference from the state. Parents are free to inculcate values, structure obligations, and demand compliance within the vertical relationship. Positive parental rights, on the other hand, extend to nonmarried parents, and they are asserted through the state against another parent. Once divorced, non-married parents have the right to require the state to do that which the state is prohibited from doing if the parents are married, namely, monitor parental behavior, require certain rules, and dictate certain socialization practices. Thus, by invoking one's positive parental right, a parent can eviscerate whatever advantages might be reaped by whomever benefits from negative parental rights.

Part II of this Article begins with an exploration of horizontal and vertical relationships. It looks at why, when, and how the law privileges such relationships. Many of the reasons for privileging relationships are the same in both the horizontal and vertical contexts. Privileging the relationships, for the most part by affording their participants the negative right to be let alone, fosters interdependence, selflessness, and connection that is thought to be beneficial to all involved.<sup>12</sup> The law hesitates before regulating family relationships because such relationships need freedom to evolve and grow as independent, self-defining entities. Family relationships, no less than individuals, need to be let alone if their potentials for expression, compassion, and self-enrichment are to be realized.

As Part III explains, however, the need to be let alone is gendered.<sup>13</sup> The

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evidentiary privileges, although both are eroding somewhat, also demonstrate the legal privileges associated with horizontal relationships. *See infra* note 64.

<sup>12</sup> As many scholars have noted, the early theory for privileging familial relationships focused on the good such relationships did for the social whole. *See* Hafen, *supra* note 6, at 874 (noting the nineteenth century legal rationalizations for "society's interest" in familial relationship); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1447 (detailing the ways the law traditionally granted privileged status to the marital relationship); *see also* Maynard v. Hill, 125 U.S. 190, 211 (1888) (noting the importance marriage has to the public); Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 178 (1916) (noting that the security of the familial relationship confers economic benefits to society). More recent trends suggest that we privilege familial relationships for the sake of the individuals involved. *See* Bowers v. Hardwick, 478 U.S. 186, 204 (1985) (Blackmun, J., dissenting) (stating that courts protect familial rights because "they form so central a part of an individual's life"); Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (noting that an individual enjoys a constitutional right to marry because the "decision to marry [is] among the personal decisions protected by the right of privacy").

<sup>13</sup> Part III explores how women and men are likely to experience relationship and the legal treatment of relationship differently. In exploring this difference, I do not mean to suggest that "a unitary, 'essential,' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience." Angela P. Harris, *Race and Essentialism in*

benefits that inure to individuals in horizontal relationships because the state does not interfere in the relationship privilege mostly men. By treating horizontal relationships as bounded entities into which the law should not penetrate, the law encourages selflessness and collectivism within the entity, but it does so at the expense of women's respect for their own autonomy as well as women's just reward for their disproportionate investment in relationships. The state's refusal to interfere with horizontal relationships encourages an interdependence that provides men with a forum for intimacy and connection, but discounts the potential dangers to women of that interdependence and intimacy. Because many more women than men define themselves in terms of relationships, women may not need the push towards interdependence and intimacy that horizontal privacy protection affords. Instead, women may need a push towards independence and autonomy.

Understanding the potential importance of that independence and autonomy for women is critical to understanding why the law should be less willing to interfere with vertical relationships and why property paradigms can help. Once the horizontal relationship between a mother and father ends, the law freely interferes with the vertical relationship between a parent and child. This interference often quashes a woman's potential to assert herself as an individual. When horizontal relationships end, women have renewed opportunities to express their autonomy, but their ability to do so depends on the law recognizing women's legitimate rights, as parents and as individuals, to be let alone. By interfering with mothers' vertical relationships whenever fathers assert positive parental rights, that is, by allowing non-custodial and often distant fathers to use the courts to monitor a mother's behavior, the state ties mothers to fathers and subordinates the negative parental rights of mothers.<sup>14</sup> This subordination of mothers' negative parental rights harms not only the mother-child relationship, which needs to be let alone if it is to thrive, but also harms the mother as an individual. Moreover, from the standpoint of women's needs, this inconsistent legal treatment of relationship is backwards. The law helps integrate men into relationships by respecting the marital entity, but the law hinders women's ability to break free of relationships by not respecting the single parent/child entity. In other words, as Part III demonstrates, men are the primary beneficiaries of state deference in the horizontal context, and the state defers. Women would be the primary beneficiaries of state deference in the vertical

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*Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990). I do mean to suggest that one can make helpful and verifiable generalizations about how men and women are likely to be differently affected by the law's treatment of relationship. There is much work still to be done on how class, race, sexual orientation, and other realities of life affect one's experience of relationship.

<sup>14</sup> The overwhelming majority of single parents are women. The *1996 Statistical Abstract* reports that 87% of the children living with only one parent are living with their mother. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1996, at 66 (116th ed. 1996).

context, but the state does not defer.

Part IV explores how better to protect women's interests by recasting vertical relationship interests as property rights. Property rules offer women the advantages of hierarchy and relativity of title. Instead of assuming, as the law currently does, that vertical relationship rights must be shared equally, property paradigms acknowledge inequality and allow courts to reward people who disproportionately invest in a relationship by clearly demarcating who has the primary interest in that relationship. Relying in part on labor-desert theory, this kind of property paradigm will require parents to earn the presumption that they act in their children's best interest,<sup>15</sup> but will allow parents who earn that presumption the freedom to structure their lives as they choose. Benefits of property rhetoric also include its associations with boundary and autonomy. By viewing women's vertical relationship rights as property rights, the law is more likely to respect the integrity of vertical relationships and less likely to assume that it has the right to interfere with that relationship. This would benefit both women's needs for independence and children's needs for consistency.

In the last ten years, feminist legal scholars have called for the feminization of tort law,<sup>16</sup> contract law,<sup>17</sup> constitutional law,<sup>18</sup> evidence law,<sup>19</sup> and procedure.<sup>20</sup> This Article will call, in part, for the masculinization of family law. It argues for a diminished reliance on the presumptions of interdependence and connection and calls for a new sensitivity to the importance of independence and hierarchy, offering property paradigms<sup>21</sup> as tools to help refocus our concerns. The law's current

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<sup>15</sup> In other words, parents should have to earn their negative parental rights.

<sup>16</sup> See, e.g., Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993); Leslie Bender, *Feminist (re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power and Responsibilities*, 1990 DUKE L.J. 848; Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989).

<sup>17</sup> See Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985).

<sup>18</sup> See, e.g., Mary Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453 (1992); Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447.

<sup>19</sup> See, e.g., Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413; Aviva Orenstein, *"My God!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CAL. L. REV. 159 (1997).

<sup>20</sup> See, e.g., Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189 (1991); Judith Resnick, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682 (1991).

<sup>21</sup> By arguing for the recognition of property principles in the family law context, I do not mean to suggest that family law doctrine should simply be subsumed into property doctrine any more than the advocates for reform of tort law, contract law, and evidence, see *supra* notes 16-20, suggest that those doctrines disappear once one introduces feminist principles. I am suggesting that

presumption of interdependence and rejection of hierarchy protects men's (often) ephemeral desire for familial connection at the expense of women's (often) latent desire for autonomy. Property paradigms will help develop a family law that encourages both interdependence and autonomy by allocating familial rights in a way that honors those who actually invest in family relationships.<sup>22</sup>

## II. THE VALUE OF RELATIONSHIPS

### A. Horizontal Relationships

Marriage is the primary institution through which horizontal relationships are afforded legal recognition and protection.<sup>23</sup> In justifying this protection, modern-day defenses of marriage must combat what is, to modern ears, a troubling past. The first marriage law, instituted in Rome in 753 B.C., stated that women "were to conform themselves entirely to the temper of their husbands and the husbands to rule their wives as necessary and inseparable."<sup>24</sup> In Rome, as in England later, legal recognition of marriage served primarily as a means of efficient property reallocation and distribution.<sup>25</sup> In the Anglo-American system, this meant that "the

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when the law fails to use "masculine" property concepts of hierarchy, independence, and boundary in the family law context, it discounts women's interests. Using property paradigms helps highlight how the law might better protect women's interests.

<sup>22</sup> I am taking as a given that the family is not a pre-political unit, but is instead a political construct, dependent on the law for its definition. See *Michael H. v. Gerald D.*, 491 U.S. 110, 124–26 (1989) (plurality opinion) (acknowledging that fatherhood is what the law says it is, not what nature or blood dictate); Frances E. Olsen, *The Family and The Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1504 n.26 (1983) [hereinafter Olsen, *The Family and The Market*] (acknowledging the theory that a family may exist only through its legal definition); Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985) (arguing against governmental intervention in families).

<sup>23</sup> Some of the right of association cases suggest that certain horizontal relationships not protected by marriage nonetheless enjoy some protection from state interference. See *Board of Dir. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 541–46 (1987); *Roberts v. Jaycees*, 468 U.S. 609, 618–20 (1984); see also *Wilson v. Taylor*, 733 F.2d 1539, 1544 (11th Cir. 1984) (holding that the right to intimate association extends to a non-marital relationship between a police officer and the daughter of a reputed organized crime figure).

<sup>24</sup> R. Emerson Dobash & Russell P. Dobash, *Wives: The 'Appropriate' Victims of Marital Violence*, 2 VICTIMOLOGY 426, 427 (1977–1978) (quoting JULIA O'FAOLAIN & LAUCO MARTINES, *NOT IN GOD'S IMAGE* 53 (1974)).

<sup>25</sup> See MARY BECKER ET AL., *FEMINIST JURISPRUDENCE* 471 (1993). Formal marriages were limited to people with property and were used, as they still are, to determine which offspring would be entitled to inherit. See, e.g., *Lalli v. Lalli*, 439 U.S. 259 (1978) (upholding state restrictions requiring that illegitimate children be legitimated before the decedent's death if they are to be entitled to inherit pursuant to state law).



very being and [legal] existence of the woman [was] suspended during the [marriage], or entirely merged or incorporated [into] that of the husband."<sup>26</sup> The abolition of coverture and the Married Women's Property Acts<sup>27</sup> helped alleviate some of the more blatantly subordinating effects of marriage for women, but many feminists remained hostile to the institution. In the early twentieth century, Emma Goldman wrote, "The institution of marriage makes a parasite of woman . . . It incapacitates her for life's struggle, annihilates her social consciousness, paralyzes her imagination, and then imposes its gracious protection, which is in reality a snare, a travesty on human character."<sup>28</sup> In the late twentieth century, Martha Fineman argues for the complete abolition of marriage,<sup>29</sup> while Nancy Polikoff characterizes marriage as "the worst of mainstream society" and "an inherently problematic institution."<sup>30</sup>

Neither the popularity nor legal recognition of this inherently problematic institution seems to be in serious jeopardy, however, at least for heterosexuals.<sup>31</sup> When forced to articulate why, courts and theorists generally argue along three lines. First, horizontal bonding is central to human happiness and is a critical form

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<sup>26</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*432.

<sup>27</sup> For a discussion of the history and abolition of coverture and the Married Women's Property Acts, see BASCH, *supra* note 8, at 17–29 and Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127 (1994).

<sup>28</sup> EMMA GOLDMAN, *Marriage and Love*, in RED EMMA SPEAKS 158, 164–65 (Alix Kates Shulman ed., 1972).

<sup>29</sup> See MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 5 (1995) (proposing that all relationships between adults should be private, non-privileged agreements).

<sup>30</sup> Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1536 (1993). At a more theoretical level, many feminists critique the separation of the public and private spheres that marriage embodies, if not defines.

Feminists conclude that the "separate" liberal worlds of private and public are actually interrelated . . . [Feminists] have shown how the family is a major concern of the state and how, through legislation concerning marriage and sexuality and the policies of the welfare state, the subordinate status of women is presupposed by and maintained by the power of the state.

Carol Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in THE PUBLIC AND PRIVATE IN SOCIAL LIFE, 296–97 (S.I. Benn & G.F. Gaus eds., 1983).

<sup>31</sup> The significant number of gay men and lesbians working for the right to marry suggests that marriage is also a popular institution in the gay community. See Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 584 (1994).

of self-expression. Second, intimacy is a good, in and of itself, and breeds many other important qualities and conditions in those who experience it. Third, relationship is a necessary precondition for independence and liberty. This Part explores each of these claims in turn. Taken together, these analyses of relationship suggest that if the expressive, intimate, and autonomy-promoting benefits of horizontal bonds are to be realized, then the state must recognize marriage as a legal category and be careful not to interfere too much with the relationship.

In perhaps the most famous Supreme Court affirmation of marriage, Justice Douglas wrote that marriage "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."<sup>32</sup> Fleshing out that noble purpose in *Bowers v. Hardwick*, Justice Blackmun wrote that "we protect the family because it contributes so powerfully to the happiness of individuals . . . ."<sup>33</sup> Comparably, in *Roberts v. United States Jaycees*, Justice Brennan wrote for the majority that "[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."<sup>34</sup> We protect these relationships because "individuals draw much of their emotional enrichment from close ties with others."<sup>35</sup> In other words, horizontal relationships can make us happy.<sup>36</sup> The Supreme Court has consistently expressed its belief that the happiness that intimate relationships bring us is of such fundamental importance that the government must be very careful when interfering with such relationships.

At a more theoretical level, several legal scholars have delved into why the intimate community found in horizontal relationships makes us happy. Milton Regan has developed a thoughtful and comprehensive theory of intimacy and how the law should respect it.<sup>37</sup> He argues that "marriage . . . is not simply a valuable

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<sup>32</sup> *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

<sup>33</sup> *Bowers v. Hardwick*, 478 U.S. 186, 205 (1985) (Blackmun, J., dissenting) (citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 500-06 (1977)).

<sup>34</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984).

<sup>35</sup> *Id.* at 619.

<sup>36</sup> As Kenneth Karst states simply, "to be human is to need to love and be loved." Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 632 (1980).

<sup>37</sup> See MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 96 (1993) [hereinafter REGAN, FAMILY LAW] ("Status is the embodiment of [marital] responsibility, a proclamation that certain intimate relationships . . . give rise to obligation because they shape each partner's sense of self."); Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2382-2406 (1994) [hereinafter Regan, *Spouses and Strangers*] (proposing that divorce settlements make each spouse's standard of living equal); Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045 (1995) [hereinafter Regan, *Spousal Privilege*] (discussing the spousal privilege doctrine in the

vehicle for achieving personal satisfaction. . . . [I]t is a web of interdependence, a 'shared history in which two people are bound together in part by what they have been through together.'"<sup>38</sup> The interdependence that characterizes intimate relationships makes those relationships self-constitutive. Building on the work of Meir Dan-Cohen,<sup>39</sup> Regan argues that choosing to become part of an interdependent relationship means choosing to accept responsibility in a manner that necessarily involves a kind of self-expression and self-development.<sup>40</sup> Kenneth Karst's vision of intimacy is comparable: "When this choice [to enter into an intimate relationship] is exercised[,] . . . the caring partner affirms her autonomy and her responsibility by choosing the commitment."<sup>41</sup>

The entity created by an intimate relationship is uniquely personal to the parties involved. From each individual's perspective, it is his choice, his feelings, and his actions, that, working in concert with the choices, feelings, and actions of the other, create another entity. This entity expresses the selves of the parties because of the inherently personal nature of the labor involved.<sup>42</sup> As Regan states, "spouses . . . don't simply help each other construct separate individual identities. . . . [T]hey participate in the creation of a shared . . . identity. . . ."<sup>43</sup> Thus, honoring and protecting a relationship is a way of honoring and protecting self-expression.<sup>44</sup> Intimacy and identity are interrelated.<sup>45</sup> It follows, therefore, that if

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context of the dichotomy between the internal and external stances toward marriage).

<sup>38</sup> REGAN, *FAMILY LAW*, *supra* note 37, at 96 (quoting R. BELLAH ET AL., *HABITS OF THE HEART* 103 (1985)); *see also* Karst, *supra* note 36, at 629 ("[I]ntimate association depend[s] on [a] sense of shared collectivity, the shared sense that 'we' exist as something beyond 'you' and 'me.'").

<sup>39</sup> *See generally* Meir Dan-Cohen, *Law, Community and Communication*, 1989 DUKE L.J. 1654 (discussing legal and social theory in relation to community, interpretation, communication, and organization); Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959 (1992) (articulating and analyzing the constitutive responsibility paradigm, which views a person's responsibility as a facet of that person's nature).

<sup>40</sup> *See* Regan, *Spousal Privilege*, *supra* note 37, at 2088-89.

<sup>41</sup> Karst, *supra* note 36, at 633.

<sup>42</sup> In the dissent in *Bowers*, Justice Blackmun noted the critical element that choice plays in relationships: "[M]uch of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of [ ] intensely personal bonds." *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting).

<sup>43</sup> REGAN, *FAMILY LAW*, *supra* note 37, at 94.

<sup>44</sup> For many, of course, marriage is also a religious experience. Its religious roots enhance the spiritual nature of the self-expression and strengthen constitutional arguments against state interference. It is important to remember, however, that marriage could easily be a religious experience without being a legal one.

<sup>45</sup> Karst argues in a somewhat different vein that "intimate associations . . . give [someone his or her] best chance to be seen (and thus to see himself) as a whole person rather than as an

the state were to regulate intimate relationships too significantly it would be interfering with an important form of self-expression—one that is critical to personal enrichment and identity.

Regan goes further, however, to argue that one's discernable role within a relationship is critical to the development of the relationship's entity status because roles "offer[ ] a model of identity defined in terms of communal norms, which can root the self in context."<sup>46</sup> This teleologic view of marital roles closely parallels the channeling function that Carl Schneider suggests for family law.<sup>47</sup> Schneider argues that the institution of marriage serves an efficiency function, by "sav[ing] our lovers from having to invent their own language," and an integrative function, by "help[ing] integrate members of society over time and place."<sup>48</sup> Life is easier—and better—with such roles, Regan and Schneider argue, because we have a model to work from and, more important, that model shows us the acceptability and rich tradition of interdependency.<sup>49</sup>

In 1927, Justice Brandeis wrote that:

[T]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone . . .<sup>50</sup>

If, as Regan, Schneider, and Karst collectively argue, intimacy and identity are integrally related and if in choosing our intimate relationships we create unique

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aggregate of social roles," but Karst concurs with Regan in finding intimate relationships critical to self-determination. See Karst, *supra* note 36, at 635–36. "[O]ur intimate associations are powerful influences over the development of our personalities." *Id.* at 636.

<sup>46</sup> REGAN, FAMILY LAW, *supra* note 37, at 89.

<sup>47</sup> See Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992). Schneider offers a tennis analogy. Just as knowing about the institution of tennis—the roles, obligations, and different behaviors that make the game enjoyable—facilitates the lives of those who happen upon a net, a ball, and two tennis rackets, so knowing about the institution of marriage facilitates the lives of lovers who want to spend their lives together. See *id.* at 511.

<sup>48</sup> *Id.* at 508, 511.

<sup>49</sup> For Regan, the roles that facilitate intimacy and interdependency are at risk in a post-modern world because a constant search for an authentic self leads one to avoid context, indeed to avoid too much connection to anything or anyone. "[T]he late twentieth century is marked by 'role distance'—a greater sense of an authentic self that stands apart from the roles that it may be asked to play." REGAN, FAMILY LAW, *supra* note 37, at 34. The post-modern "fragmentation of the self may result in less emotional investment in any particular personal relationship." *Id.* at 89. If we constantly strive to define ourselves, we have less time to invest in others and, therefore, less time to experience the enhanced form of self-expression that relationship affords.

<sup>50</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

interdependencies that themselves constitute self-expression, then horizontal relationships must be viewed as souls with their own emotions, sensations, and beliefs. And they must be entities that have the right to be let alone by the government.<sup>51</sup>

The value of self-expression is not the only one that flows from relationship, however. The fusing of personalities that follows from a relationship leads to an expanded vision of the self, such that one's own self-interest becomes blurred into that to whom one feels connected.<sup>52</sup> Hence, familial responsibilities "liberate us" to find that which we otherwise would not find in ourselves.<sup>53</sup> To use Regan's example, a parent who dives into the water to save her drowning child is acting in her own self-interest as well as her child's.<sup>54</sup> One takes care of one's dying lover, not because he deserves it, but because one wants to. An attempt to separate the two lovers' needs is as pointless as an attempt to figure out whose interest is most served by a mother rescuing her child. Thus, Lawrence Houlgate discusses the normative benefits that flow from seeing his solicitude not as something he "owes" his wife because she has earned it, but as something that flows as an instinctive obligation.<sup>55</sup> "The mere need of others in my family for my benevolent attention suffices for my obligation to give it."<sup>56</sup> Everyone benefits from institutions that serve the needy and dependent in this manner because that which would be borne by the totality is instead borne by the smaller functional unit. Moreover, if we can agree that caring and selflessness are values that we think benefit not only individuals but society as a whole, we should endorse institutions that foster them.<sup>57</sup> The state is simply incapable of nurturing the same kind of caring selflessness because obligations imposed by the state will always seem more a matter of duty than self-interest. The benefit of the family is that one meets the needs of dependency not because it is a

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<sup>51</sup> Regan would also argue that if the state fails to respect roles within these relationships, it risks destroying the very relationships it is supposed to respect. He suggests that the state should respect these roles by awarding alimony based on a theory of interdependence. *See* Regan, *Spouses and Strangers*, *supra* note 37, at 2406-07.

<sup>52</sup> *See* REGAN, *FAMILY LAW*, *supra* note 37, at 113.

<sup>53</sup> To love and be loved is good because it allows us to explore just how giving we can be. *See* Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1, 41; *see also* Hafen, *supra* note 6, at 912 ("Bonds of lasting intimacy leave family members undeniably vulnerable, but the same relationships and loyalties that seem to tie us down are, paradoxically, the sources of strength most likely to lift us up.").

<sup>54</sup> *See* REGAN, *FAMILY LAW*, *supra* note 37, at 113. Regan also cites studies of the rescuers of Jews in Nazi Europe who tended not to view their decision to help as a choice, but as a spontaneous obligation that sprang from within them. *See id.* at 114.

<sup>55</sup> *See* LAURENCE D. HOULGATE, *FAMILY AND STATE* 39 (1988).

<sup>56</sup> *Id.* Houlgate's vision of family distributional justice seems to resemble the familiar collectivist call of: "From each according to his ability. To each according to his need."

<sup>57</sup> *See* Lee E. Teitelbaum, *Moral Discourse and Family Law*, 84 MICH. L. REV. 430 (1985).

social duty, but because meeting such needs is a part of who one is.

The collectivism and selflessness that mark intimate relationships also give rise to alternative visions of justice. As Kenneth Karst notes, "marriage is an association emphasizing 'shared commitment' rather than rules . . . . The resolution of differences between spouses who intend to stay together looks toward healing the relationship for the future, not settling up old transgressions."<sup>58</sup> Houlgate writes, "when we come home to our families, we return to a relationship of intimacy, defined by conditions of mind, not overt action, by trust and devotion instead of formal rules, rights, and duties."<sup>59</sup>

Our formal systems of justice are particularly bad at adjudicating disputes in such relationships.<sup>60</sup> Lee Teitelbaum suggests that the law's failure in this regard stems from its focus on individuals and specific sets of behaviors.<sup>61</sup> As a general matter, the law looks at individual behavior to determine whether any given action violates defined, objectively-discernable norms of conduct. Because intimate relationships are an entity, and expressions, behaviors, and obligations within that entity flow not from objective and discernable principles but from established patterns and a relationally specific sense of duty,<sup>62</sup> the law is ill-equipped to determine questions of fairness.

Moreover, the law is unable or extremely reluctant to dismiss past transgressions in the hope or faith that the perpetrator will not do something wrong again. Yet this kind of forgiveness is common if not critical in ongoing relationships. A relationship worthy of the name can survive only if the parties recognize that a future together is more important than the actions of the past. One's faith in the future may have everything to do with one's understanding of the past, but the endurance and health of the relationship is a matter of subjective faith, not objective fact. Abstract legal principles and objective methodologies have no way of evaluating the strength of that faith. By keeping the law out of relationships, we

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<sup>58</sup> Karst, *supra* note 36, at 639.

<sup>59</sup> HOULGATE, *supra* note 55, at 35.

<sup>60</sup> In my Family Law class, I usually start the semester by asking this question designed to analyze when we are comfortable invoking formal systems of justice: "If you are walking down the street and see two men in a fist fight are you likely to call the police?" The answer to that question is usually "maybe." I then ask whether the student is more or less likely to call the police if the two people know each other. Without a doubt, students respond that they are less likely. I ask why. The responses are usually something along these lines: "The parties probably know how to work it out;" "They may do this all the time;" "They probably do not want me to;" "The police won't know enough about the situation to do the right thing." At a minimum, these responses suggest a distrust of third party intervention into personal, ongoing relationships.

<sup>61</sup> See Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1177.

<sup>62</sup> By this I mean a sense of duty that grows from the particular relationship itself. Each relationship has its own unique duties and obligations that exist as a function of the unique entity created by blending two separate identities.

force the parties to evaluate that faith on their own. We force the parties to learn how to work it out.

Legal rights give public expression to conflict and by doing so may harm the parties' abilities to work these conflicts out.<sup>63</sup> By refusing to adjudicate disputes within horizontal relationships, the state privileges the alternative, more collectivist, and forward-looking construction of justice associated with family.<sup>64</sup> As Kenneth Karst remarks: "There are sound reasons for the state to leave the members of an ongoing intimate association alone, to let them carry on their relations with a minimum of state intervention. If they cannot work out their differences, the exits are clearly marked."<sup>65</sup>

This alternative, familial construction of justice also has value for many people because it provides an escape from the alienation bred by objective rules and autonomous interactions. The family offers an alternative to a world "in which our relationships with others are largely abstract and formalistic . . ."<sup>66</sup> The family can

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<sup>63</sup> See MINOW, *supra* note 9, at 289–91. Minow makes this point in evaluating Justice Powell's dissent in *Goss v. Lopez*, 419 U.S. 565 (1975). In *Goss*, the plaintiffs, bringing a procedural due process claim after being suspended from school without any process, argued that they were, as individuals, entitled to certain rights. *See id.* at 568–69. Justice Powell, arguing in dissent that the state should not interfere with the school's summary procedures, focused on how, by affording the students the right to publicly express their grievance, the Court would impose an adversarial dynamic on a student-teacher relationship that can function effectively only if it is seen as non-adversarial. *See id.* at 593–94 (Powell, J., dissenting). The same argument can be made with regard to affording legal rights within horizontal relationships.

<sup>64</sup> One of the justifications for the spousal immunity doctrine relies on the need to protect the relational entity even if it means sacrificing individual rights. At common law, neither husband nor wife were allowed to sue each other. *See* HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 631–32 (2d ed. 1987). Many of the reasons given for the doctrine were rooted to the legal unity of husband and wife and the wife's accordant inability to own property. These rationales died with the Married Women's Property Acts, but courts continued to protect the immunity under any of a number of different theories including the importance of protecting family harmony, the potential for fraud and collusion, and the trivial nature of the disputes. *See id.* at 635–36. While many of these justifications seem rooted in an outdated view of the family that gives inadequate weight to the possible importance of individual, particularly female, rights within the family, if it is true that rights give public expression to conflict and may thereby threaten relationship, there may be reasons not to abandon the doctrine completely. *See* Regan, *Spousal Privilege*, *supra* note 37, at 2049 (explaining the spousal testamentary privileges as, in part, reflecting the view that marriage is a universe of "shared meaning . . . [in which each] . . . spouse stands inside the marriage as a participant who accepts its claims, not outside it as an observer who calls those claims into question").

<sup>65</sup> Karst, *supra* note 36, at 640 (citing Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 292 (1973)).

<sup>66</sup> HOULGATE, *supra* note 55, at 35. Some have argued that the current understanding of the nuclear family developed during the nineteenth century as a refuge from the fears associated with the emerging and threatening values of egalitarianism and individualism. *See* John Demos, *Images*

provide this alternative haven only if the state resists intruding. Too much state interference will turn family interactions into formal, abstract relationships.

The final important justification for privileging horizontal relationships stems from the role such relationships play in providing a community and, hence, a sense of autonomy. The family acts as the first-level community mediating the inevitable tension that exists between individual and state.<sup>67</sup> Families help individuals traverse that vast intermediate space between the self and everyone else by providing a core of others to whom one belongs and to whom one can claim as one's own.<sup>68</sup> Without that sense of belonging, we cannot develop a sense of autonomy because we form our personalities, thoughts, and passions only through interaction with the communities of which we are a part.<sup>69</sup> Jennifer Nedelsky writes: "If we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but relationships . . ." <sup>70</sup> "[A]utonomy is a capacity, not a static human characteristic . . . What is essential to the development of autonomy is not protection against intrusion but constructive relationship." <sup>71</sup>

Too much state interference in our relationships destroys our sense of community. It is the unique nature of our communities, the distinct entities formed by the blending of personalities, that allows us to claim our relationships as our own. By understanding how we are the same and different from those through whom we define ourselves, we claim our own autonomy. If the state provides that definition for us, the relationship cannot serve the mediating function that allows people to come to a full understanding of their own autonomy.

Thus, contemporary justifications for legal marriage emphasize the expressive, enriching, and morally beneficial roles that horizontal relationships play in our lives. Horizontal relationships enable us to come to know ourselves as more than

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*of the American Family, Then and Now*, in CHANGING IMAGES OF THE FAMILY 43, 49–51 (Virginia Tufté & Barbara Myerhoff eds., 1979). For criticism of this position, see Arlene Skolnik, *Public Images, Private Realities: The American Family in Popular Culture and Social Science*, in CHANGING IMAGES OF THE FAMILY, *supra*, at 297, 310–14 (arguing that the sentimental moral family never really existed).

<sup>67</sup> The sense of alienation and atomism that has led some to call for a resurgence of the importance of family, *see supra* note 66; Hafen, *supra* note 6; Hafen, *supra* note 53, may be a response to what Gerald Frug calls the liberal movement toward "undermining . . . the vitality of all groups that . . . [hold] an intermediate position between what we now think of as the sphere of the individual and that of the state." Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1088 (1980).

<sup>68</sup> *See* Hafen, *supra* note 53, at 10 ("[Families] protect autonomous development of personal values and preferences . . . while also teaching the value of belonging to a larger social order.").

<sup>69</sup> *See* MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 150–51 (1982).

<sup>70</sup> Nedelsky, *supra* note 5, at 12.

<sup>71</sup> Jennifer Nedelsky, *Law, Boundaries, and The Bounded Self*, in LAW AND THE ORDER OF CULTURE 162, 168 (Robert Post ed., 1991).



independent actors governed by external norms and obligations. Imposing state-mandated norms and obligations on individuals within marriage runs the risk of obliterating the very qualities that make horizontal relationships worthwhile.

### B. *Vertical Relationships*

If marriage is the primary institution through which the state honors horizontal relationships, parenthood is the primary institution through which the state honors vertical relationships. Any discussion of parenthood, however, must start with an acknowledgement of how little we know about who a parent is. Parents are not merely those who have donated genetic material to a child. "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."<sup>72</sup> Parent/child-like relationships do not confer parental rights upon the parent-like adults either. Stepparents, who often share financial responsibility, disciplinary obligations, and nurturing duties with a biological parent, enjoy no concurrent parental rights to their stepchildren.<sup>73</sup> Even men who have both a biological connection to a child and an extensive relationship with that child do not necessarily enjoy parental rights.<sup>74</sup> Thus, a man has no constitutional protection of his paternal status unless he was married to the mother at the time of the birth of the child and the mother agrees to his paternity<sup>75</sup> or he has a blood connection to the child, a relationship with the child, a relationship with the mother, *and* the mother is not married to someone else.<sup>76</sup>

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<sup>72</sup> *Lehr v. Robertson*, 463 U.S. 248, 260 (1983) (quoting *Caban v. Mohamed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)). In *Lehr*, the Court ruled that a biological father does not necessarily have the right to veto another parent's adoption of his child. *See id.*; *see also* *Quilloin v. Walcott*, 434 U.S. 246 (1978) (holding that a biological father with no connection to the child does not have the right to veto the adoption of that child).

<sup>73</sup> *See* David L. Chambers, *Stepparents, Biologic Parents, and the Law's Perceptions of "Family" after Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 102, 108-09 (Stephen D. Sugarman & Herma Hill Kay eds., 1990); *see also* *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977) (holding that foster parents do not have a sufficient liberty interest in their relationship with their foster children to require a hearing to determine who should be vested with parental rights).

<sup>74</sup> *See* *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding California's presumption that the husband of the mother at the time of the child's birth is the father of that child even though the non-spouse, biological father of that child had intermittently lived with and supported both the child and the mother for the first four years of the child's life).

<sup>75</sup> *See id.*

<sup>76</sup> *See* Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 *UCLA L. REV.* 637 (1993). As Janet Dolgin carefully analyzes, the Court is concerned as much with the character of the father's relationship with the mother as it is with the character of the father's relationship with his children. The closer the family members' relationship resembles the stereotypical nuclear family, the more likely the Court is to acknowledge paternal rights. *See id.*

Motherhood tends to be a less contentious matter although reproductive technologies are beginning to change this.<sup>77</sup> A California court conferred legal maternal status on a genetic donor, whose claims to the child were being challenged by the gestational mother.<sup>78</sup> The court ruled that because the genetic donor “intended to bring about the birth of the child that she intended to raise as her own,” she was entitled to legal parental status.<sup>79</sup> A significant number of state statutes still have ambiguous definitions of mother,<sup>80</sup> but to date, none of those statutes have been challenged constitutionally.<sup>81</sup>

Assuming one does meet the legal criteria for either motherhood or fatherhood, one’s substantive rights to a relationship with the child depend on whether the vertical relationship is supported by a horizontal relationship. For married parents, the rights associated with their status as parents afford them negative liberty from state intervention into the rearing of their children. Negative parental rights afford

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at 657. See generally Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967 (1994) (arguing that parental claims should be determined by considering genetic relationship, assumption of responsibility, and provision of care to the child); Mary L. Shanley, *Unwed Fathers’ Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60 (1995) (exploring alternative approaches to unwed fathers’ rights in the adoption context).

<sup>77</sup> See, e.g., *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (en banc) (regarding a dispute over the parental rights of a surrogate mother and the couple who supplied the fertilized embryo); *In re Baby M*, 537 A.2d 1227 (N.J. 1988) (regarding a dispute over the parental rights of a surrogate mother and the biological father and his wife).

<sup>78</sup> See *Johnson*, 851 P.2d at 786.

<sup>79</sup> See *id.* at 782. For further discussion of this argument, see John Lawrence Hill, *What Does it Mean to Be A “Parent”? The Claims of Biology As A Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 369–81 (1991). But see *In re Baby M*, 537 A.2d at 1264, in which the court refused to grant maternal status to the wife of the biological father of the child even though the biological father and his wife, not the gestational mother, originally intended to parent the child.

<sup>80</sup> Some state statutes define “mother” as the “natural” mother without explaining what happens if the woman who bears the child is not the woman who donated the genetic material. See KY. REV. STAT. ANN. § 402.020(2) (Michie Supp. 1996); ME. REV. STAT. ANN. tit. 5, § 17001 (West 1989); N.H. REV. STAT. ANN. § 546-A:1 (1997); W. VA. CODE § 61-8-12 (1997). Georgia defines “mother” as the “biological or adoptive mother” without explaining whether the “biological” nexus need be genetic or gestational. See GA. CODE ANN. § 15-11-2(10.2) (Supp. 1998). Other states define “mother” as the woman who gave birth to the child. See CONN. GEN. STAT. ANN. § 45a-604(1) (West 1993 & Supp. 1998); 750 ILL. COMP. STAT. 45/4 (West 1993). North Dakota defines “mother” as the woman who donated the genetic material to the child. See N.D. CENT. CODE § 14-19-01 (1997).

<sup>81</sup> Such a challenge could be forthcoming. In *Lehr v. Robertson*, Justice Stevens explained that the process of carrying a child to term invests the mother who carries the child with more parental rights than a man who has “only” donated genetic material and has therefore not made as much of an investment. See *Lehr v. Robertson*, 463 U.S. 248, 258–62 (1983).

parents a presumption that they act in their children's best interest.<sup>82</sup> Parents have the right to discipline their child, to educate their child, to choose medical treatment and religious tradition for their child, to decide where their child shall live, and to determine who may visit the child and in whose care the child shall be placed.<sup>83</sup> The propriety of vesting parents with this power stems both from the realization that "[m]ost children, even in adolescence, simply are not able to make sound judgements concerning many decisions"<sup>84</sup> and the concern that vesting such decisions in the state could lead to a kind of homogeneous state socialization that is "wholly different from [the concept of individual] upon which our institutions rest . . . ."<sup>85</sup>

The Court has made clear that parents have the primary right and responsibility to regulate the behavior of their children.<sup>86</sup> Thus, notwithstanding the state's *parens patriae* authority,<sup>87</sup> and in stark contrast to the kind of socialization process that Plato envisioned,<sup>88</sup> "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."<sup>89</sup> Parents have rights "to bring up [a] child in the way he should go."<sup>90</sup> The "primary role of the parents in the upbringing of their children is . . . established beyond debate as an enduring

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<sup>82</sup> See *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected . . . concepts of the family as a unit with broad parental authority . . ."). Thus, parents make decisions for children that, if the children were adults, the children would make for themselves.

<sup>83</sup> See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 884–85 (1984).

<sup>84</sup> *Parham*, 442 U.S. at 603.

<sup>85</sup> *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923). The Court contrasted what it saw as the American individualism ideal with the kind of state education proposed by Plato in *The Ideal Commonwealth*. Plato envisioned a society in which "children [were] to be common, and no parent [was] to know his own child . . ." so that the state could properly inculcate the values most appropriate for the Commonwealth. See *id.* at 401–02 (citations omitted in original).

<sup>86</sup> See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal [to] us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (citation omitted)).

<sup>87</sup> The *parens patriae* power allows the state to act to protect children from their own inability to protect themselves. See *Prince*, 321 U.S. at 162.

<sup>88</sup> See *supra* note 85.

<sup>89</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

<sup>90</sup> *Prince*, 321 U.S. at 164. *Prince* is often cited for the proposition that the state must not interfere in family life, but *Prince* is one of the few constitutional parental rights cases in which the Court held that the government regulation was permissible. Mrs. Prince was a single parent.

American tradition.”<sup>91</sup> The right to socialize one’s children is part of “the private realm of family life which the state cannot enter”<sup>92</sup> because “[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”<sup>93</sup> Moreover, the state is not free to evaluate any particular parent’s socialization process absent compelling circumstances.<sup>94</sup> The state must produce clear and convincing evidence of parental unfitness before it terminates married parents’ rights to socialize their children.<sup>95</sup>

Thus, the negative right to raise one’s children as one chooses brings with it a critical instrumental benefit—the socialization of children.<sup>96</sup> What the Court has not fully explained, however, is who benefits from that protected socialization process. Upon examination, one sees that the answer is everyone—the parent, the child, and society as a whole. Understanding how those benefits run is important to understanding how and why the vertical relationship needs protection.

As various scholars have analyzed, parents reap substantial benefits from vertical relationships. Stephen Gilles suggests that “[t]he project of parenting—having, nurturing, and educating one’s children—is central to our conception of human flourishing.”<sup>97</sup> Jeffrey Blustein submits that adults have and raise children “not because . . . [the children] will continue the family, or are potential sources of relief and aid, but because they are new bonds of love.”<sup>98</sup> After all, as Kenneth Karst argues in the context of horizontal intimacy, “to be human is to need to love

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<sup>91</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

<sup>92</sup> *Prince*, 321 U.S. at 166.

<sup>93</sup> *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–04 (1977) (citation omitted).

<sup>94</sup> As Justice Stewart stated:

If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest, I should have little doubt that the State would have intruded impermissibly on the “private realm of family life which the state cannot enter.”

*Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)); *see also* *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (quoting *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring)).

<sup>95</sup> *See Santosky v. Kramer*, 455 U.S. 745, 768 (1982).

<sup>96</sup> *See generally* Bartlett, *supra* note 83, at 890 (describing the view that protecting parental rights serves instrumental goals).

<sup>97</sup> Stephen Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 962 (1996).

<sup>98</sup> Jeffrey Blustein, *Child Rearing and Family Interests*, in *HAVING CHILDREN* 115, 118 (Onora O’Neill & William Ruddick eds., 1979).

and be loved.”<sup>99</sup> Children are an outlet and an inlet for love.

Parenting is also a form of self-expression. Gilles argues that parental authority to educate children should be protected from state interference precisely because socializing one’s children is a form of speech that is critical to the parents’ protected rights of self-expression.<sup>100</sup> David Richards writes that “[c]hild-rearing is one of the ways in which many people fulfill and express their deepest values about how life is to be lived.”<sup>101</sup> Katharine Bartlett explains in a somewhat different tone, but in strains that resonate with some of the theories developed in Part II.A, that child rearing allows adults to accept freely the obligations of parenthood as a means of trying to realize their “ennobled selves.”<sup>102</sup> “In this sense, responsibility is a form of self-expression.”<sup>103</sup>

The self-sacrifice implicit in parenting also requires caretakers to (re)define themselves in the context of their children. Parenthood often forces parents to find within themselves a selflessness that they did not know they had. One father, who accepted primary caretaking responsibility, comments:

Children are greed machines; they’re inhuman, [and] amoral . . . . You give and give all day long and they take and take. . . . You can’t love children in the abstract, not if you take care of them every day. . . . You have to get into self-sacrifice, or you’ll end up abusing them. . . . But it’s been the best thing that’s ever happened to me. I know my kids now. You can’t love anyone you don’t know. . . . And they love me.<sup>104</sup>

Therefore, raising children is good for parents—in part because it provides a bond of love, in part because it involves a form of self-expression, and in part because the self-sacrifice entailed allows for the development of a higher moral being.<sup>105</sup> Hence,

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<sup>99</sup> Karst, *supra* note 36, at 632.

<sup>100</sup> See Gilles, *supra* note 97, at 1015 (“Speech and expression are the ordinary means whereby parents seek to impart values, habits, skills and knowledge to their children.”).

<sup>101</sup> David A.J. Richards, *The Individual, The Family and The Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 28 (1980).

<sup>102</sup> See Bartlett, *supra* note 9, at 301 (citing NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* 5 (1984)). This reasoning parallels Milton Regan’s use of Dan-Cohen’s responsibility as self-expression theory. See *supra* text accompanying notes 38–40.

<sup>103</sup> Bartlett, *supra* note 9, at 301.

<sup>104</sup> JANE SWIGART, *THE MYTH OF THE BAD MOTHER* 118–19 (1991) (quoting unidentified father).

<sup>105</sup> Bruce Hafen tells a story of his wife’s willingness to calmly, but unrelentlessly, sit with their son and force him to complete a project he had no interest in completing. When asked how she managed to put up with him, she said “I didn’t know I had it in me.” See Hafen, *supra* note 53, at 40.

we see that the benefits of vertical relationships for adults are not very much different from the benefits of horizontal relationships. Vertical relationships are another form of intimate connection that fosters self-expression and moral growth.

Moreover, the essence of that vertical bond must remain free from too much governmental interference for the same reasons applicable in Part II.A. Were the state to interfere with the vertical relationship, it would compromise the relationship's ability to thrive as a source of self-expression.<sup>106</sup> Comparably, accepting parental responsibility can only serve a self-constitutive function if the decision to accept that responsibility comes from within and not from external mandate. The benefits of finding one's own capacity and desire for self-sacrifice disappear if the state mandates that self-sacrifice.

Adults are not the only beneficiaries of the parent-child relationship, however. Children benefit from intimate vertical relationships in two ways. First, as the beneficiaries of the educational and socialization process that is an inherent part of child rearing, children learn how to be adults. Second, as emotionally dependent human beings, children rely on the emotional attachment implicit in vertical relationships.

A parent's constitutional right to "bring up a child in the way he should go,"<sup>107</sup> benefits the child because, without the kind of value-laden educational process that child rearing involves, children would not have a value structure from which to operate. Gilles writes that "parents' loving efforts to transmit their values help form [ ] children's characters, enable them to learn what it is to have a coherent way of life, and develop their capacity to enter into caring, long-term relationships with others."<sup>108</sup> As the Court noted in *Smith*, day to day contact breeds not only love and knowledge of the other, but an ability to socialize.<sup>109</sup> "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association and from the role it plays in 'promot[ing] a way of life' through instruction of children."<sup>110</sup> The socialization function that parents fulfill teaches a child not only what is right and what is wrong, but, more importantly, that there is a difference between right and wrong. Parents may transmit values as a form of their own self-expression, but

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<sup>106</sup> As Bartlett notes, "a tight, comprehensive set of [governmental] controls would remove from parents the discretion to act, upon which the capacity of moral decisionmaking actually depends." Bartlett, *supra* note 9, at 301.

<sup>107</sup> *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944).

<sup>108</sup> Gilles, *supra* note 97, at 941.

<sup>109</sup> See *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977).

<sup>110</sup> *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231–33 (1972) (second modification in original)). The Court in *Smith* went on to say that the fact of the blood relationship weighed into the importance of the family relationship. See *id.*

in doing so they provide their children with the understanding that coherent value structures exist. Whether any individual young adult accepts the value system with which she was socialized is irrelevant to the importance of having received, at an early age, an understanding of what values are. One's ability to learn and reason and develop depends in part on having some sort of belief system from which to operate.<sup>111</sup> This is the guidance implicit in the term child "rearing."

As Stephen Gilles points out, teaching one's children and loving one's children are necessarily one in the same task because "nurturing a child cannot sensibly or practically be divorced from shaping that child's values."<sup>112</sup> Thus, the second way in which children benefit from vertical relationships flows from the first. Children need nurturance, not just because they need to learn values, but because they need to learn love. However, even though human beings may need to love and be loved, children are particularly needy because "only a child who has at least one person whom he can love, and who also feels loved, valued and wanted by that person, will develop a healthy self-esteem."<sup>113</sup> Children need to know consistent love if they are ever to be able to love themselves.<sup>114</sup> Just as they need to come to know right and wrong, they need to come to know love. They come to know this by having a vertical bond to which they belong.

A vertical relationship in which a child is taught so that she is capable of learning and in which a child is loved so that she is capable of loving allows a child to grow into autonomy. Again, what allows people to be autonomous is relationship. As Jennifer Nedelsky suggests, one cannot really be autonomous without feeling autonomous,<sup>115</sup> and one cannot feel autonomous without having a sense of what connection is.<sup>116</sup> Children need a distinct relationship because they need to be able to identify themselves with something bigger than themselves, but smaller than the vast public other.<sup>117</sup> Too much state interference with that vertical relationship

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<sup>111</sup> See generally ALASDAIR MACINTYRE, *AFTER VIRTUE* 152 (1981) (explaining that "knowing how to apply the law is itself possible only for someone who possesses the virtue of justice"); ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988) (discussing the connection between rationality, justice, and laws).

<sup>112</sup> Gilles, *supra* note 97, at 967.

<sup>113</sup> JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTEREST OF THE CHILD* 20 (1973).

<sup>114</sup> See Mary D. Ainsworth, *The Effects of Maternal Deprivation: A Review of Findings and Controversy in the Context of Research Strategy*, in *DEPRIVATION OF MATERNAL CARE* 97, 143 (1962); ERIK H. ERIKSON, *IDENTITY AND THE LIFE CYCLE* 122-31 (1980); Nadia Ehrlich Finckelstein, *Children in Limbo*, 25 *SOC. WORK* 100 (1980).

<sup>115</sup> See Nedelsky, *supra* note 5, at 24.

<sup>116</sup> Children need to belong to something because, as Martha Minow acknowledges, "belonging is essential to becoming." Martha Minow, *"Forming Underneath Everything that Grows: Toward a History of Family Law"*, 1985 *WIS. L. REV.* 819, 894.

<sup>117</sup> See *supra* notes 67-71 and accompanying text.

destroys the distinctiveness of that to which the child belongs. Children need to be able to claim a relationship as their own.<sup>118</sup> By protecting the organic growth of vertical relationships, we allow children to benefit from the sense of belonging implicit in being a part of a unique relationship.

Before moving on, it is worth noting that the liberal state also benefits from vertical relationship protection. Because the government is prevented from affirmatively sponsoring certain religious, cultural, or political beliefs,<sup>119</sup> the state may not be able to provide the kind of value-laden education that children need as a baseline. By delegating the socialization function to parents, liberal society benefits because the citizens that emerge from the process are capable of the kind of ethical, rational, and reasonable behavior necessary for a democracy to function. We vest parents with negative rights in part because the government benefits from the benefit that the children receive when parents are free to inculcate their children with their own values.<sup>120</sup> As both Bruce Hafen and Steve Gilles have pointed out, this kind of individualized socialization function performed by parents helps develop adults for a pluralist society.<sup>121</sup>

Perhaps surprisingly, remarkably few parents or children enjoy the negative parental rights that I have just analyzed and that the Supreme Court has so emphatically upheld. Approximately 26% (17 million) of children live with a divorced, separated, or stepparent, and another 7.7% (4.9 million) live with a never-married parent.<sup>122</sup> Thus, almost one-third of the children in this country must live with the ramifications of positive parental rights.<sup>123</sup> Positive parental rights give non-married parents the ability to invoke the state's help in monitoring the other parent's behavior. In these situations, it is the state that determines how the child should be raised. If one parent disagrees with how the other parent wants to raise the

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<sup>118</sup> The critical contribution of arguably the most influential book on the law of children establishes that children need more than just love; they need consistent love from a consistent person or group of persons. See GOLDSTEIN ET AL., *supra* note 113, at 31–39. To the extent children need to claim their *own* family, their sense of possession is important. See Hafen, *supra* note 53, at 31.

<sup>119</sup> See *Bellotti v. Baird*, 443 U.S. 622, 638–39 (1979) (“[A]ffirmative sponsorship of ethical, religious or political beliefs is something we expect the state *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice.”).

<sup>120</sup> See Bartlett, *supra* note 83, at 890–93.

<sup>121</sup> See Gilles, *supra* note 97, at 960; Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 480–82 (1983).

<sup>122</sup> See Richard E. Behrman & Linda Sandham Quinn, *Children and Divorce: Overview and Analysis*, FUTURE CHILDREN, Spring 1994, at 4. These are 1990 statistics.

<sup>123</sup> Not every child in a single or stepparent household must live with the ramifications of positive parental rights because some non-custodial parents choose not to or cannot (because of death or ignorance) interfere with their children's upbringing.



child, the first parent can invoke the court's decisionmaking authority, under the "best interest of the child" standard,<sup>124</sup> thereby, eviscerating the parental right to be free from governmental interference and the presumption that a parent acts in his child's best interest.

For instance, a parent's freedom to raise her children in the religious tradition that she chooses is compromised if there is another parent who disagrees.<sup>125</sup> A parent's right to inculcate values is comparably compromised if the other parent has different values and asks the court to mediate.<sup>126</sup> A single parent cannot decide how much money should be spent on her children or what it should be spent on.<sup>127</sup> She also loses the ability to bring up her children in a community of her own choosing.<sup>128</sup> In short, all of the parental rights elucidated above disappear once

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<sup>124</sup> The great majority of states use a best interest of the child standard to determine which parent should have primary custody of the child. *See* CLARK, *supra* note 64, at 797. Even states that do not use a best interest standard for initial custody determinations, *see* *Pikula v. Pikula*, 374 N.W.2d 705, 706 (Minn. 1985) (holding that primary custody is presumptively awarded to the parent who has been the primary caregiver up to that point in time); *Garska v. McCoy*, 278 S.E.2d 357, 358 (W. Va. 1981) (same), use the standard for ongoing modification of parental behavior. *See infra* text accompanying notes 192–202.

<sup>125</sup> *See* *Mentry v. Mentry*, 190 Cal. Rptr. 843, 850 (Cal. Ct. App. 1983); *Kirchner v. Cuaghey*, 606 A.2d 257, 264 (Md. 1992); *Felton v. Felton*, 418 N.E.2d 606, 611 (Mass. 1981); *Robert O. v. Judy E.*, 395 N.Y.S.2d 351, 352 (N.Y. Fam. Ct. 1977); *Madagan v. Klein*, 473 S.E.2d 778, 787 (N.C. 1996); *Munoz v. Munoz*, 489 P.2d 1133, 1136 (Wash. 1971). *Cf.* *Morris v. Morris*, 412 A.2d 139, 147 (Pa. 1979).

<sup>126</sup> *See* *Jarrett v. Jarrett*, 400 N.E.2d 421, 427 (Ill. 1980), *cert. denied*, 449 U.S. 927 (1990) (holding that the cohabitating mother loses custody because she would not marry her new sexual partner); *G.A. v. D.A.*, 745 S.W.2d 726, 728 (Mo. Ct. App. 1987) (denying lesbian mother custody because of her lesbianism).

<sup>127</sup> *See* *Peterson v. Peterson*, 434 N.W.2d 732, 738 (S.D. 1989) (holding that the court is to determine the "realistic needs of the children and the obligor's ability to satisfy these requisites" and, if income is over a certain amount, the court is to decide the "appropriate level" of contribution); *see also In re Marriage of Bush*, 547 N.E.2d 590, 596 (Ill. 1989). Both of those cases involved families with "excess income," that is, families in which the father's income was great enough that the court felt that it did not need to award the child as much of a percentage of the father's income as the statutory child support guidelines would suggest. The mothers were arguing that more of the father's income should be spent on the children. If children are living at the other end of the economic scale, the state can require mothers to participate in trying to get the biological father to pay support, regardless of whether the mothers want to try to receive income from their children's father. *See* David Chambers, *Fathers, the Welfare System and the Virtues and Perils of Child Support Enforcement*, 81 VA. L. REV. 2575, 2602–03 (1995). States require paternal notification notwithstanding findings that 43% of never married mothers and 42% of divorced mothers do not want a collection order issued. *See* ANDREA BELLER & JOHN GRAHAM, *THE ECONOMICS OF CHILD SUPPORT* 20–21 (1993).

<sup>128</sup> *See* *Fingert v. Fingert*, 271 Cal. Rptr. 389, 390–91 (1990) (recounting previous lower court ruling that prevented primary custodian from moving from California to Chicago where she

another person with parental status invokes the state's authority.

Note the effect this evisceration of negative liberty has on the adult benefits of vertical relationships. Parenting one's children cannot be a way in which to "fulfill and express [one's] deepest values about how life is to be lived"<sup>129</sup> if one is not free to rear children with the values that form the essence of one's sense of human flourishing. When parental obligations are dictated by the state, the acceptance of child rearing responsibility ceases to be a form of self-expression. The intimacy of day to day contact that enables a knowledge and love of one's children and engenders an embracing of self-sacrifice is minimized if one is parenting according to court order or if one is reduced to biweekly and holiday visits.<sup>130</sup>

Positive parental rights also erode the benefits that children receive from vertical privacy protection. Children cannot learn a coherent value structure if they are subject to competing value systems.<sup>131</sup> Multiple vertical bonds that permit children to maintain relationships with many parent-like figures may serve the children's need for ongoing relationships,<sup>132</sup> but they do so at the expense of a sense of belonging to one group. The more the court interferes, the less the child belongs

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had an opportunity to take over her father's business); *Ramirez-Barker v. Barker*, 418 S.E.2d 675, 680 (N.C. Ct. App. 1992) (holding that primary custodian could not move from Chapel Hill, North Carolina to California so that she and the child could be close to her relatives); *In re Marriage of Sheley*, 895 P.2d 850, 856 (Wash. Ct. App. 1995) (restricting custodial mother from moving out of the Seattle area).

<sup>129</sup> Richards, *supra* note 101, at 28.

<sup>130</sup> Only approximately one quarter of children in single parent households see their father as often as once a week. See Judith Seltzer, *Relationships Between Fathers and Children Who Live Apart: The Father's Role After Separation*, 53 J. MARRIAGE & FAM. 79, 86 (1991), cited in Chambers, *supra* note 127, at 2600.

<sup>131</sup> In their study of 1100 divorced couples with minor children in California, Eleanor Maccoby and Robert Mnookin found that only one quarter of the divorced parents were able to cooperate effectively on child-related decisions. A substantial group of the parents openly fought over these decisions and tried to undermine the other parent's decisions. Another common strategy was to disengage from the other parent in order to avoid contact and open contrast, but to leave the child coping with inconsistent parental decisionmaking. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD* 247 (1992).

<sup>132</sup> Courts, legislatures, and commentators now routinely endorse awarding visitation privileges to non-parents. See *Hughes v. Banning*, 541 N.E.2d 283, 285 (Ind. Ct. App. 1989) (granting visitation rights to stepmother); *K.R. v. K.R.*, 537 N.W.2d 774, 778 (Iowa 1995) (granting visitation rights to grandparents); *Guma v. Guma*, 518 N.Y.S.2d 19, 20 (N.Y. App. Div. 1987) (granting grandparents the right to intervene in custody action); see also 750 ILL. COMP. STAT. ANN. 5/607 (West 1993) (codifying visitation rights); WASH. REV. CODE ANN. § 26.09.240(1) (West 1997) (same). See generally Bartlett, *supra* note 9 (suggesting that legal notions of parenthood should be directed away from parental possessiveness and self-centeredness); Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1 (1997) (advocating the designation of many adults as "parents").

to one unit. With a “waning sense of belonging”<sup>133</sup> comes increased difficulty in becoming an autonomous adult. If one needs a solid sense of whence one is from before one can define oneself, than a diffuse (even if rich) combination of vertical relationships may do children a disservice. As one researcher concluded,

[a]s a consequence of divided parental authority and lack of respect given to one another, [divorced] parenting tends to become more problematic: discipline is more coercive, and expectations are more inconsistent, all of which are predictive of more negative and distant parent-child relationships and increase in children’s emotional and behavioral problems.<sup>134</sup>

Multiple vertical relationships do not necessarily do children a disservice. Others argue that the constancy of various relationships is more important than rooting a child in any one particular relationship.<sup>135</sup> The fact is that we simply do not know the relative benefits of many different and diffuse relationships versus a few constant and stable relationships.<sup>136</sup> And these are mutually exclusive alternatives. The more people with a “claim” to a vertical relationship with the child, the less stable the child’s life will be because more lives are necessarily less stable than fewer lives. Moreover, the justification of state deference to the parent-child relationship rests on the notion that parents deserve and children need the stability of a primary relationship through which values can be expressed and inculcated and in which parents invest enough to make them the best arbiter of what is in the child’s welfare. If non-married parents do not deserve and children of divorce or separation do not need such a primary relationship, then state deference to vertical relationships cannot be justified for traditional nuclear families either. As it has emerged to date, the law affords negative parental rights to married parents because the primary parent-child relationship is so important to both parent and child, but the law ignores the importance of that primary relationship once parents are

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<sup>133</sup> Hafen, *supra* note 53, at 1.

<sup>134</sup> Janet R. Johnston, *High-Conflict Divorce*, in *FUTURE CHILDREN*, Spring 1994, at 172.

<sup>135</sup> See Bartlett, *supra* note 9; Cahn, *supra* note 132. Many cultures, for example the African-American community in this country and the Kibbutz communities of Israel, rely on multiple vertical relationships to do the work of child rearing, see MENACHEM GERSON, *FAMILY, WOMEN AND SOCIALIZATION IN THE KIBBUTZ* 48–57, 71–75 (1978) (regarding the Kibbutz community); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 270–72 (1995) (regarding the African-American community), but there is a significant difference between consensual multiple vertical relationships and forced multiple vertical relationships. Evidence suggests that when courts force a parent to accept another vertical relationship into the child’s life, the stress created by that force does the child a disservice. See *infra* text accompanying notes 203–07.

<sup>136</sup> As Lee Teitelbaum has pointed out elsewhere, attempts to prove which child rearing practices are “best” are futile because multiple causation problems make reliable empirical studies of family life almost impossible to design. See Teitelbaum, *supra* note 57, at 437.

divorced or if they were never married.<sup>137</sup>

### C. Summary

To this point we have explored two different kinds of intimate relationships, one horizontal, the other vertical, both of which enjoy legal protection. We have seen that just as the legal protection of marriage cannot be defended as it once was—as a means of protecting a person's property right by securing his right to control another—and, instead, must be defended on expressive, spiritual, and self-enrichment grounds, so the legal protection of parenthood cannot be defended, as it is often thought to be, as a means of protecting one's right to control one's genetic output. The justification for legal protection of parenthood, like the justification for the legal protection of marriage, is rooted in the expressive, spiritual, and enriching nature of self-defining relationships. Thus, for the most part, the justification for legal protection of intimacy is the same in both the horizontal and vertical context. Intimate relationships deserve legal protection because of the self-constitutive role they fill for individuals. They are self-constitutive for adults because of their expressive, moral, and integrative functions and because of their ability to help adults achieve autonomy. Intimate relationships are self-constitutive for children in an even more concrete way. They provide children with a loving, value-laden community with which, and through which, children can grow into responsible, loving adults. The government's deference to these relationships is critical to the relationships' value because too much external regulation destroys the essence of the boundaried, internally solidified bond that defines intimacy. The next Part explores how, notwithstanding the analysis above, the benefits and burdens of governmental interference with both horizontal and vertical relationships are gendered.

## III. GENDER AND THE LEGAL PROTECTION OF RELATIONSHIP

### A. Horizontal Relationships and Gender

Men and women are different.<sup>138</sup> Why this is so is the subject of tremendous

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<sup>137</sup> Arguably, the law does this because once parents are divorced or if they were never married, there is no one primary relationship. There are two primary relationships with two different parents. For the great majority of children of divorce or never married parents, however, this is simply an inaccurate assumption. There is usually only one custodial parent who is the primary caretaker and, in all but the biological sense, the primary parent. See *infra* notes 216–20 and accompanying text.

<sup>138</sup> Because this Article is not the place to explore the important differences between sex and gender, see generally Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995);

debate, but whether one roots gender difference in biology,<sup>139</sup> psychology,<sup>140</sup> sociology,<sup>141</sup> political power,<sup>142</sup> or some combination of all of these forces,<sup>143</sup> empirical research clearly establishes recurring differences in the way men and women see people,<sup>144</sup> value others,<sup>145</sup> relay information,<sup>146</sup> and render justice.<sup>147</sup> The most important differences for family law are men's and women's differing

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Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989), I am using the terms "women" and "men" interchangeably with the notion of females and males who have been raised and live in our current gender system. Whether the documented differences between females and males would exist with the frequency that they do in a gender system very different than our own is a question well beyond the scope of this Article.

<sup>139</sup> See generally RUTH BLEIER, *SCIENCE AND GENDER* (1984) (discussing how biological science is and has been used to subordinate women).

<sup>140</sup> See generally NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978) (discussing how mothering in Western society produces unequal gender relations).

<sup>141</sup> See generally SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley ed. & trans., Alfred A. Knopf 1953) (1949) ("Women are not born they are made.").

<sup>142</sup> See generally CATHARINE A. MACKINNON, *Difference and Dominance*, in *FEMINISM UNMODIFIED* 32, 37 (1987) (explaining "that hierarchy of power produces real as well as fantasied differences"); Williams, *supra* note 138, at 801 (arguing that work and family responsibilities "are at the core of the contemporary gender system, which systematically enriches men at the expense of women and children").

<sup>143</sup> Most feminists, including the ones just cited, probably fall best into this category. See, e.g., ALISON M. JAGGER, *FEMINIST POLITICS AND HUMAN NATURE* (1983); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyers Process*, 1 BERKELEY WOMEN'S L.J. 39, 39-40 (1985); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). Whether or not one agrees that women and men are inevitably different, the theoretical and empirical research strongly suggest, and I will assume, that there are gender differences. See CHODOROW, *supra* note 140; CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); MACKINNON, *supra* note 142; JEAN BAKER MILLER, *TOWARD A NEW PSYCHOLOGY OF WOMEN* (2d ed. 1986); NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* (1984); BLEIER, *supra* note 139; Williams, *supra* note 138.

<sup>144</sup> Suzanna Sherry, summarizing the work of Nancy Chodorow and Carol Gilligan writes, "the feminine perspective views individuals primarily as interconnected members of a community . . . . Women thus tend to see others as extensions of themselves rather than as outsiders or competitors." Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 584-85 (1986).

<sup>145</sup> "The moral imperative . . . [for] women is an injunction to care . . . . For men, the moral imperative appears rather as an injunction to respect the rights of others." GILLIGAN, *supra* note 143, at 100.

<sup>146</sup> See generally DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND* 91 (1990) (explaining that women tend to use "personal experience and examples rather than abstract argumentation" to explain or understand their concept of truth).

<sup>147</sup> See GILLIGAN, *supra* note 143, at 25-31, for the now famous example of Jake and Amy's different approaches to the Heinz dilemma.

experiences with intimacy, selflessness, justice, and autonomy.

In Part II.A, we saw that relationships, like marriage, contribute so powerfully to people's happiness because marriage is one of the very few arenas in which people are able to experience and express an expanded sense of self—a sense of self that is fundamentally intertwined with someone else. Marriage allows one to be in the world not just as an independent being, but as part of a unit, and, therefore, it is important for the law to protect that unit as a unit.

Protecting or encouraging these units seems largely unnecessary for many women, however. Women create unities with others all the time. As Carrie Menkel-Meadow summarizes, “[t]he common theme that unites [the] body of work by psychologists such as Chodorow, Dinnerstein, Miller, Schaef and [ ] Gilligan, is that women experience themselves through connections and relationships to others while men see themselves as separately identified individuals.”<sup>148</sup> Although radical and cultural feminists disagree about the desirability of this female fusion of intimacy and identity, both groups acknowledge its applicability.<sup>149</sup> Gilligan's subjects, whether they were in horizontal relationships or not, defined their identity “in the context of relationship.”<sup>150</sup> Without any privacy veils to encourage their investment in relationship, many women already are bonded, connected, and intimate with much of the world around them.<sup>151</sup>

Thus, marriage is not *the* institution through which women experience connection, and many women do not experience a kind of unique transcendent self when they bond with another individual in marriage. Bonding, blending themselves with others, is what many women do all the time. It is the primary way they come to know themselves. Accordingly, for many women, there is less need to privilege the marriage bond as essential to a unique form of self-expression because marriage is just one intimate bond among many for women.

Moreover, as some of the radical feminist arguments suggest, there may be a real need to protect women from marriage's tendency to over-emphasize intimacy.

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<sup>148</sup> Menkel-Meadow, *supra* note 143, at 43.

<sup>149</sup> Catherine MacKinnon calls the Gilligan findings with regard to women and relationships “accurate social regularities.” Catharine MacKinnon, *The 1984 James McCormick Mitchell Lecture: Feminist Discourse, Moral Values and the Law—A Conversation*, 34 BUFF. L. REV. 11, 73 (1985). West argues that both radical and cultural feminists “adhere to some version” of the “connection thesis.” West, *supra* note 143, at 14–15. The differences lie in the extent to which this connection should be celebrated. “Cultural feminists . . . have reidentified these differences [with regard to intimacy] as women's strengths rather than women's weaknesses.” *Id.* at 18. Whereas, “to radical feminism, women's connection to others is the source of women's misery . . .” *Id.* at 29.

<sup>150</sup> GILLIGAN, *supra* note 143, at 160.

<sup>151</sup> Joan Williams rejects the notion “that women are [necessarily] focused on relationships while men are not.” Williams, *supra* note 138, at 802. However, she acknowledges that women are much more likely than are men to prioritize relationships. *See id.* at 830–31.

Robin West explains, “[f]or radical feminists, [the] potential for connection—experienced materially in intercourse and pregnancy, but experienced existentially in all spheres of life—is the source of women’s debasement, powerlessness, subjugation, and misery.”<sup>152</sup> The kind of self-expression and wholeness that many women need help with is not the wholeness that comes from bonding with another; it is the kind wholeness that comes from recognizing that one does not need to be bonded with, responsible for, or dependent on anyone.<sup>153</sup> Many women do not need more interdependence to express themselves; they need, as Virginia Woolf wrote towards the beginning of this century “a room of [their] own”<sup>154</sup>—where they are free not to worry about how they intertwine with everyone else. As West writes:

[W]omen’s longings for individuation, physical privacy, and independence go well beyond the desire to avoid the dangers of rape or unwanted pregnancy . . . . Women . . . long for . . . the freedom, the independence, the individuality, the sense of wholeness, the confidence, the self-esteem, and the security of identity which can only come from a life, a history, a path, a voice, a sexuality, a womb, and a body of one’s own.<sup>155</sup>

Consciously or not, the male justifications<sup>156</sup> for protecting horizontal intimacy that were explored in Part II.A parallel what West describes as the critical legal

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<sup>152</sup> West, *supra* note 143, at 29. This Part relies heavily on West’s extensive critique of liberal theory, critical legal theory, cultural feminism, and radical feminism. The reliance is well-deserved. As Professor Chris Littleton stated, West’s *Jurisprudence and Gender* was “paradigm-shifting.” Christine A. Littleton, *Women’s Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 31. Nonetheless, as Joan Williams explains, in relying in part on biological determinism to explain women’s connection, West may be confusing biology with metaphor. See Williams, *supra* note 138, at 800–01 n.11. Women who have never been pregnant still behave in ways that demonstrate the connection thesis. Intercourse is not necessarily more of an experience of connection for women than it is for men. For purposes of this Article, it does not matter whether West’s theory of connection is rooted in biology or metaphor. If it is an accurate description of the ways in which men and women, as they exist in our society, are different, (a proposition that Williams does not deny) then it must be accounted for in law.

<sup>153</sup> Consider the comments of one of the divorced women in Catherine Reissman’s study of the effects of divorce on men and women: “Trying to be my own person, well, it’s scary . . . . [But] [t]here’s a certain kind of exhilaration in taking yourself seriously, thinking about yourself as an entity, trying to be whole unto yourself.” CATHERINE KOHLER REISSMAN, *DIVORCE TALK* 179–80 (1990). Cf. Olsen, *The Family and The Market*, *supra* note 22, at 1565 (“By relating with women in families, men try to reclaim wholeness.”).

<sup>154</sup> VIRGINIA WOOLF, *A ROOM OF ONE’S OWN* (1929).

<sup>155</sup> West, *supra* note 143, at 35.

<sup>156</sup> I call them male justifications because: (1) they were explained by men and (2) they seem to be describing the masculine position. I do not mean to suggest that all men agree with them.

theorist account of human nature. "According to critical legal theory, we are indeed physically separate from the other, but what that existentially entails is that we dread the alienation and isolation from the separate other, and long for connection with him."<sup>157</sup> It is that connection, albeit within the parameters of a pre-defined institution of marriage, that Regan, Hafen, Schneider, and Karst<sup>158</sup> want to celebrate and privilege. This may not be what women need at all, however.

The marital roles that Regan celebrates as allowing us the opportunity to "root the self in context" and that Schneider praises for their efficient and integrative function may be oppressive for women. Rooting oneself in context is of limited value if the context is of limited (or negative) value.<sup>159</sup> Men may want the law to protect and solidify their interdependent relationships, but women may want the law to enable them to experience independence.<sup>160</sup> Women may want the opportunity to abandon their historical roles as providers of intimacy.<sup>161</sup>

The opportunity to be less intimate would afford women the opportunity to be less selfless. The intimacy and connection that leads one to dive in after one's drowning child is surely a good thing in the abstract, but why is it that women are always the ones diving in?<sup>162</sup> If "[c]aring, nurturance, and an ethic of love and responsibility for life is second nature" for women,<sup>163</sup> they may not need institutions to foster those qualities in them. As Margaret Radin has explained,

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<sup>157</sup> West, *supra* note 143, at 12.

<sup>158</sup> Karst did not necessarily endorse the institution of marriage, but he did argue for privileging horizontal intimate relationships. See Karst, *supra* note 36.

<sup>159</sup> I cannot resist revisiting Professor Schneider's tennis analogy. See *supra* note 47, at 511. The following story is true. I grew up the only girl in a family with two older brothers who frequently played tennis. I played too, but my role was ball-girl. This meant I ran across the court to pick up badly hit balls and, after retrieving them, dutifully threw them to the next person serving. This role made sense for me. I was not as good as my brothers at hitting the ball over the net, nor did I feel that it was my right to hit the ball over the net. Still, I wanted to play with them, to be connected to them, and to have them be connected to me. They wanted me to feel a part of their game too. By making me ball-girl we could all feel fulfilled. With everyone in their proper roles, we could play and be happy together. Nonetheless, many women, if given the opportunity, may now aspire to be more than ball-girls.

<sup>160</sup> Again, consider several of Reissman's subjects: "[J]ust the pride of being able to handle everything[.] . . . I feel good about myself." REISSMAN, *supra* note 153, at 169. "I feel much more secure, independently [sic] of him . . ." *Id.* at 172.

<sup>161</sup> To paraphrase a popular t-shirt from the early 1970s, "Intimacy is not Destiny."

<sup>162</sup> The average American woman spends 11 1/2 years of her working life caring for children or dependent others. The average man spends six months. See Tamar Lewin, *Aging Parents: Women's Burden Grows*, N.Y. TIMES, Nov. 14, 1989, at A1; see also ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT* 3 (1989) (concluding that women working outside the home work approximately one full month a year more than their spouses).

<sup>163</sup> West, *supra* note 143, at 18.



celebrating the “ethic of care” that women feel may be “an artifact of coping with oppression.”<sup>164</sup> If protecting horizontal relationships encourages the participants to be more selfless than they otherwise would be, there is a strong argument against women entering into such relationships. The increased selflessness for women might lead to the elimination of self. Someone needs to jump in after the drowning child, but by assigning that role to women, our system of gender affords men the freedom to develop themselves as individuals without constantly worrying about who is drowning.<sup>165</sup> When men do dive in they may feel “liberated” by finding selflessness in themselves,<sup>166</sup> but they may be in far less danger of losing their selves in the first place.

Comparably, the alternative sense of justice that governs horizontal relationships may be the last thing women need in order to become whole. As explained above, horizontal relationships depend on trust and forgiveness and faith in the future. These qualities come more easily to people for whom intimacy is second nature, but they are qualities that can do more harm than good. As Susan Moller Okin suggests in her critique of justice and the family, “[t]o substitute self-sacrifice and altruism for justice in the context of a unity that may dissolve before one’s very eyes, without one’s consent and to the detriment of those one cares most about, would perhaps be better labeled lack of foresight than nobility.”<sup>167</sup> The experience of many battered women suggests that women have been far too willing to trust, forgive, and have faith in men who, by almost any standard, do not deserve it.<sup>168</sup> Indeed, it is women’s willingness to stay in a relationship, to live with that alternative sense of justice that relies on conciliation and hope rather than abstract principle, that has kept women in battering relationships.<sup>169</sup> Whether or not one believes in the theory or utility of the Battered Women’s Syndrome, its very existence suggests that, for women, “the exits [from relationship] are not clearly marked.”<sup>170</sup> Women may need the law to provide much bigger exit signs. That

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<sup>164</sup> Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1717–18 (1990).

<sup>165</sup> Joan Williams speaks about this problem in the context of women subordinating their careers for the sake of the family. “Women know that if *they* do not sacrifice *no one* will, whereas men assume that if *they* do not, *women* will.” Williams, *supra* note 138, at 831 (emphasis added).

<sup>166</sup> This was Bruce Hafen’s argument. See Hafen, *supra* note 53, at 41 and accompanying text.

<sup>167</sup> SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 32–33 (1989).

<sup>168</sup> For a general account of the pervasiveness of domestic violence, see Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46 (1992); see also LENORE E. WALKER, THE BATTERED WOMAN (1979).

<sup>169</sup> See Littleton, *supra* note 152, at 43–47 (“[W]omen [may] value connection enough to keep trying despite marginally greater risks of harm.”).

<sup>170</sup> As mentioned previously, Kenneth Karst suggests that formal systems of justice and state

courts routinely dismissed claims by battered women<sup>171</sup> suggests that the courts understood neither the interdependency of intimacy or women's particular need to be free of it.

As Lee Teitelbaum explains, when we respect the alternative sense of justice within horizontal relationships by not introducing abstract principles and rights "the practical consequence . . . is to confer or ratify the power of one family member over others."<sup>172</sup> In the context of many inter-relationship disputes, from domestic violence to divisions of labor within the family,<sup>173</sup> this "alternative" system of justice seems particularly unjust for women because it prevents them from invoking external and rights-based theories in support of their own position. As suggested above, abstract legal principles and the rights that threaten relationship can do the less-empowered a world of good.<sup>174</sup>

Intimacy is work. Women may do that work more naturally than men do,<sup>175</sup> but that does not mean it should go uncompensated. Foregoing one's own needs, evaluating each context and feeling responsible for others takes energy, time, and intelligence. It may not be the kind of energy, investment, or intelligence that has commanded respect traditionally in our culture, but many men come to rely on the fact that women do it. Consider the correlation between women's economic independence and marital discord. Women who are contributing economically have less time to do the work of intimacy. When wives work, spousal interaction decreases, resulting in increased marital disagreement and reduced marital happiness.<sup>176</sup> The more economically independent women are, the higher their

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interference with relationship are inappropriate because for people who "want out," "the exit signs are clearly marked." See *supra* notes 64-65 and accompanying text. For a thorough discussion of the Battered Women's Syndrome, see generally Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991).

<sup>171</sup> See R. EMERSON DOBASH & RUSSEL P. DOBASH, WOMEN, VIOLENCE, AND SOCIAL CHANGE, 199-209 (1992); SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE 210-16 (1982).

<sup>172</sup> Teitelbaum, *supra* note 61, at 1174.

<sup>173</sup> Numerous studies documenting how partners allocate domestic chores indicate that women do vastly more caretaking and other domestic work than do men. For a summary of these studies, see HOCHSCHILD & MACHUNG, *supra* note 162, at 271-78. Hochschild and Machung conclude that women who work outside the home work approximately one full month (or twenty-four days) a year more than their wage-earning spouse. See *id.* at 3.

<sup>174</sup> See Minow, *supra* note 9, at 1873-82.

<sup>175</sup> See Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 154 (1992) ("Caretaking is done by women most of the time in most families."); FINEMAN, *supra* note 29, at 162 ("[I]ntimacy and its maintenance have always been and continue to be disproportionately allocated to women.").

<sup>176</sup> See Alan Booth et al., *Women, Outside Employment, and Marital Instability*, 90 AMER. J. SOC. 567, 567-87 (1984).

divorce rate.<sup>177</sup> When women cannot accommodate themselves to their husband's schedules or cannot muster energy to provide a haven from a heartless world, marriages falter. Thus, intimacy is not only work, it is work that appears critically important to keeping a marriage together.<sup>178</sup>

By allowing horizontal relationships to be governed by an alternative sense of justice, we rob women of the opportunity to appeal to more traditional and masculine senses of justice that determine fairness based on traditional theories of desert, most obviously the labor they perform.<sup>179</sup> To invoke Carol Gilligan's now famous subjects, if Amy were free to rely more on the logic of justice than the ethic of care, Jake might have to respect the work of intimacy that Amy does. This might make Jake much less likely to take advantage of Amy and much more likely to stay home with a sick child, wash the dishes, and invest time nurturing others. And Amy might be able to spend more time "in a room of her own."

Thus, the values associated with privileged horizontal relationships are values that many women already have, but that men may need.<sup>180</sup> The values associated with individualism and autonomy are values that many men already have, but that women may need. It follows, therefore, that the benefits associated with marriage may well inure disproportionately to men because, although marriage can serve the expressive and constitutive functions for women, marriage is just one of many relationships through which women identify themselves and in which they work out unique forms of interdependence. It is not that marriage has no expressive or moral value for women, it is just that it does not have such unique value for women.

What marriage often does provide for women is economic sustenance. Women provide for themselves by providing intimacy for others. The justification for state deference to marriage explicated in Part II.A may be based on the spiritual interdependence resulting from the blending of two personalities, but the economics of the situation indicate a more concrete and rather troubling exchange theory of interdependence. Men pay their spouses for the intimacy that women provide.<sup>181</sup>

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<sup>177</sup> See IRWIN GARFINKEL & SARA S. McLANAHAN, *SINGLE MOTHERS AND THEIR CHILDREN* 66-67 (1986).

<sup>178</sup> Of course, women's participation in the workforce also may be positively correlated to divorce because women who earn wages outside the home are less in need of their husbands' support. If it is economic freedom that leads to marital discord, however, it would appear that the interdependence hailed in Part II.A as a self-realizing justification for marriage seems less a matter of choice than conscription for some women.

<sup>179</sup> As Carol Rose notes, "when we see the unspoken property within arrangements that masquerade as 'sharing,' we can also see their injustice . . ." Rose, *supra* note 4, at 2415.

<sup>180</sup> See Olsen, *The Family and The Market*, *supra* note 22, at 1565 ("[T]he family is a realm in which [men] can expose their 'weaknesses,' in which they may embrace without shame the values traditionally associated with women.").

<sup>181</sup> Husbands earn substantially more than their wives do. Among full-time workers, married men earn 124% more than married women do. See BUREAU OF THE CENSUS, U.S. DEP'T OF

This arrangement hurts women in two ways. First, at divorce, the law is notoriously bad at capturing the value that the work of intimacy provided to the union.<sup>182</sup> Second, because women will likely not be compensated at divorce for the intimacy that they have provided, women have a very large incentive to stay married. Divorce, however beneficial it might be for women physically or emotionally,<sup>183</sup> is an economic disaster for women.<sup>184</sup> By refusing to interfere with marital relations and by failing to capture the financial value of intimacy, the law fosters the interdependence that enhances some men's sense of wholeness, but stunts many women's growth.

Thus, the primary advantages that privileging the marital bond hold for men are relatively less important for women because the expressive and constituent roles that marriage serves for men are relatively less important for women, who have other relationships that serve this purpose. The haven from a heartless world that the

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COMMERCE, SER. P-60, NO. 180, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1991, at 112, 114 (1991). It is well established that women's earnings decline when they get married, while men's increase. See VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 58-64 (1988).

<sup>182</sup> Although numerous eminent scholars have tried to articulate a satisfactory theory of alimony, see Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 73, at 130; Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989); Regan, *Spouses and Strangers*, *supra* note 37, the task seems to have eluded us so far. It is incredibly difficult to capture, in financial terms, the value that intimacy provides.

<sup>183</sup> Levels of depression in women are closely correlated to their satisfaction with their marriages. An expert panel of the American Psychological Association found that "[a]n unhappy or tension-filled marriage makes women three times more likely to get depressed than it does men in similar relationships." Daniel Goleman, *Women's Depression Rate is Higher*, N.Y. TIMES, Dec. 6, 1990, at B18 (quoting Dr. Ellen McGrath). One researcher from that study found that working outside the home helped alleviate some women's depression. See Julia Lawlor, *Goodbye to the Job. Hello to the Shock*, N.Y. TIMES, Oct. 12, 1997, § 3 (Money & Business), at 11 ("[S]tay-at-home wives with troubled marriages were the most depressed, followed by employed wives with troubled marriages and tension-filled jobs. Stay-at-home wives with happy marriages had relatively low levels of depression, but least depressed were employed wives with happy marriages . . ."). Reissman concluded that women benefit psychologically from the "public manifestations of independence" brought about by divorce. See REISSMAN, *supra* note 153, at 177.

<sup>184</sup> White women experience a 20% to 26% drop in their standard of living after divorce. African-American women experience a 28% to 31% drop. White men's standard of living, on the other hand, was found to rise between 26% to 44% after divorce, and African-American men's standard of living rose 22% to 35%. See Annemette Sørensen, *Estimating the Economic Consequences of Separation and Divorce: A Cautionary Tale from the United States*, in *ECONOMIC CONSEQUENCES OF DIVORCE* 278-79 (Lenore J. Weitzman & Mavis Maclean eds., 1992). Other evidence suggests that the harmful effects of divorce decline somewhat over time, as women remarry, but women who stay single rarely recapture their pre-divorce standard of living. See Greg Duncan & Saul Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, in *DEMOGRAPHY* 485, 490 (1985).

family provides for men can easily trap women in systems of justice in which their work is disproportionately extracted, but undervalued. Too much emphasis on interdependence in a marriage fosters financial vulnerability in women and impedes women's ability to express themselves as independent actors. For all of these reasons, it appears that the primary beneficiaries of the law's respect for the marital boundary are men.

### B. *Vertical Relationships and Gender*

As we saw in Part II.B, the law does not treat all vertical relationships as boundaried entities into which it should not enter; it privileges only those vertical relationships that are supported by horizontal relationships. A single parent has little, if any, right to be free from state intervention with her vertical relationship. If she enjoys that freedom, it is only because the other parent chooses not to invoke the state's power. My use of the female pronoun here is intentional. The great majority of primary caretakers of children are women.<sup>185</sup> Thus, the adults most likely to be hurt by state interference with the vertical relationship are women.

Applying some of the insights from Part III.A above, one might argue that this state interference is not detrimental for women because, as analyzed, women are less in need of privileged relationships because they are so ontologically connected to others. A female caretaker will experience the expressive, selfless, and connectedness values associated with her relationship with her child regardless of what the state does. The problem with state interference with vertical relationships, however, is not so much that it destroys the benefits of intimacy for the caretaker, but that the state interference does little good for the child and ties the caretaker to a horizontal relationship—with the father—that she often no longer wants, needs, or deserves. This Part explores how state interference into vertical relationships is unnecessary for children, and once again, privileges men's desire for potential connection at the expense of women's need for autonomy. As explained below, neither the children's interests nor the non-custodial parents' interests justify the restrictions that courts routinely impose on single mothers' autonomy.<sup>186</sup>

#### 1. *The Child's Interest in State Interference*

Arguably, negative parental rights should only be afforded in those instances

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<sup>185</sup> See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *supra* note 14, at 66 (reporting that 87% of single parents are women).

<sup>186</sup> All relationships restrict our autonomy somewhat. Good relationships both restrict and enhance our autonomy, however, by providing something positive through which we come to understand ourselves as other. Relationships that cease to be supportive cease to provide this positive source of self-definition and serve only as a restriction on our thought and action.

in which vertical relationships are supported by horizontal relationships because it is only in those family situations that we are confident that the parents will actually do the best job of raising the children. Evidence supports the notion that children do best in a household with two married parents.<sup>187</sup> There is no evidence, however, that the state's intrusion into single parent households gets the job done any better.<sup>188</sup> The needs that children have for non-neutral, value-laden belief systems and consistent, stable, loving relationships are necessarily jeopardized by more state interference.<sup>189</sup> Nonetheless, the willingness of the state to interfere with parenting decisions has grown in the last twenty-five years, in no small part because of the acceptance of psychological parenting theory<sup>190</sup> and its concurrent premise that a neutral arbiter can determine the best parent in any given situation.<sup>191</sup> The standard routinely used by that neutral arbiter is the best interest of the child.

Few legal standards have encountered as much criticism in as short a time as has the best interest of the child standard.<sup>192</sup> Robert Mnookin attacks the standard for failing to provide a set of values that a judge can use as a guide and for pretending that we can accurately predict what will be in a child's long-term interests.<sup>193</sup> David Chambers assails the inevitable paternalism of the standard. It is not "possible to develop a state-prescribed view of children's interests that does not mindlessly refer to the majority's (or the judge's) preferences."<sup>194</sup> Mary Ann

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<sup>187</sup> See FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, *DIVIDED FAMILIES* 68-70 (1991). Children from divorced households are more than 50% more likely to have long-term behavioral problems than children from married households although, as the authors note, 66% of children from divorced households had no such behavioral trouble. Moreover, there are serious control sample problems. We do not know what would have happened to children of divorce if they had instead been children of distressed marriages. As a legal matter, it is the divorce, not the distress, that justifies state interference on behalf of the children. See *id.*

<sup>188</sup> As Justice Brandeis warned in *Olmstead v. United States*, "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purpose is beneficent." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

<sup>189</sup> See *supra* text accompanying notes 106-18.

<sup>190</sup> This is the theory developed in Freud, Goldstein, and Solnit's *Beyond the Best Interest of the Child*. See GOLDSTEIN ET AL., *supra* note 113.

<sup>191</sup> See Martin Guggenheim, *The Political and Legal Implications of the Psychological Parenting Theory*, 12 N.Y.U. REV. L. & SOC. CHANGE 549, 551-52 (1983-1984).

<sup>192</sup> For a summary of the major critiques of the standard, see Carl E. Schneider, *Discretion, Rules and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2219-26 (1991); see also Becker, *supra* note 175, at 172-83.

<sup>193</sup> See Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226, 258-61.

<sup>194</sup> David Chambers, *Rethinking the Substantive Rules of Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 491 (1984). This problem can be particularly acute in a time when we are no longer comfortable with objective standards of good parenting. See Teitelbaum, *supra* note 57, at

Glendon argues that the standard's indeterminacy increases litigation and the attendant problems (particularly for children) with lengthy custody disputes.<sup>195</sup> Jon Elster objects to preferencing the child's needs because, even if courts were capable of determining those needs, preferencing them unfairly neglects the needs and entitlements of the parents involved.<sup>196</sup> Martha Fineman demonstrates how the best interest of the child standard lets medical and social service professionals usurp the role that mothers once played in determining what is in the child's interest.<sup>197</sup>

Similarly, judges themselves recognize the problems with assuming that the state can make appropriate decisions under the best interest of the child standard. The first state supreme court to reject the best interest standard for custody determinations acknowledged that "in the average divorce proceeding intelligent determination of relative degrees of fitness requires a precision of measurement which is not possible given the tools available to judges."<sup>198</sup> Concurring in a rare federal decision involving the standard, a perplexed Judge Brown asked, "[o]n what do we draw in making these choices? Are we, as Federal Judges, endowed with sufficient prescience to decide such delicate issues? We should remind ourselves that we do not possess the wisdom of Solomon . . . ."<sup>199</sup>

When courts ostensibly rely on the best interest standard, they often evaluate the adults' status and behavior, not parenting ability. Courts routinely penalize parents for behavior that the court finds objectionable, regardless of whether that behavior has been demonstrated to have a negative impact on the child. Thus, the fact that a custodial parent strayed from the terms of a custody agreement after changing her mind about the lifestyle and religion with which her children should be reared was sufficient cause for taking away her custody rights; the court did not

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<sup>195</sup> See Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986).

<sup>196</sup> See Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 16-20 (1987).

<sup>197</sup> See Martha L. Fineman, *The Politics of Custody and the Transformation of American Custody*, 22 U.C. DAVIS L. REV. 829, 846 (1989). This problem is probably most famously depicted in the case of *Painter v. Bannister*, in which maternal grandparents were awarded custody over the biological father after the grandparents produced an expert psychologist who testified that the child's best interest would be served by awarding custody to the grandparents. The father was unable to afford an expert. See *Painter v. Bannister*, 140 N.W.2d 152, 158 (Iowa 1966). The Iowa Supreme Court found that it had no choice but to accept the uncontradicted evidence from the grandparents' expert and awarded custody to the grandparents. See *id.* The biological mother, who died in a car accident, had specifically requested that the father retain custody. See *id.*

<sup>198</sup> *Garska v. McCoy*, 278 S.E.2d 357, 361 (W. Va. 1981).

<sup>199</sup> *Drummond v. Fulton County Dep't of Family & Children's Serv.*, 563 F.2d 1200, 1212 (5th Cir. 1977). Judge Brown did not comment on how the state court judges who routinely make these decisions come upon their prescient wisdom or solomonic judgement.

evaluate whether the children were negatively affected by her behavior.<sup>200</sup> In an emerging body of case law, courts are awarding custody to non-biological parents who have psychological relationships with the children; however, they will do so only if the biological parent misled the non-biological parent into believing that he was the biological parent.<sup>201</sup> The concern is not whether the child is actually best served by the custody award, but whether the parent who seeks custody deserves it. That courts do not routinely award custody to the parent in the “nicer” or “more natural” home suggests that courts implicitly recognize that the parental desert, not just a child’s interest, plays a significant role in custody determinations.<sup>202</sup>

The fact that courts make custodial and child rearing decisions based on factors other than the child’s best interest undermines the argument that we need state interference with vertical relationships in order to help single parents make better child rearing decisions. Courts do not know how to make child rearing decisions. They do not like making child rearing decisions and, in response, even when they are supposed to, courts often do not make child rearing decisions. Instead, they allow the child rearing decision to be made as a byproduct of a judicial evaluation of the adults’ behavior.

Our willingness to accept state interference into vertical relationships should also be tempered by the recognition that children are the clear losers in ongoing court battles. Contact with more than one parent is good for the child only if that contact is achieved without creating tension or stress in the custodial household.<sup>203</sup> The most important determiner of children’s mental health after divorce is the anxiety level of the custodial parent.<sup>204</sup> Children of parents who have a highly conflictual relationship after divorce are two to four times more likely to be clinically disturbed.<sup>205</sup>

Many non-married parents can share their vertical relationships without so much stress, but by providing the court with the authority to act as arbiter, we exacerbate the problems for those parents who cannot work it out on their own.<sup>206</sup>

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<sup>200</sup> See *Friederwitzer v. Friederwitzer*, 432 N.E.2d 765 (N.Y. 1982).

<sup>201</sup> See *In re Roberts*, 649 N.E.2d 1344 (Ill. 1995); *Price v. Howard*, 484 S.E.2d 528, 537 (N.C. 1997); *D.G. v. D.M.K.*, 557 N.W.2d 235, 242 (S.D. 1996).

<sup>202</sup> See *Chambers*, *supra* note 194, at 500 (stating that depriving custody to a parent who is less wealthy or slightly less conforming than the other parent seems less fair).

<sup>203</sup> See *FURSTENBERG & CHERLIN*, *supra* note 187, at 106–07 (explaining that increased contact with the non-custodial parent is good, all else being equal, but if the increased contact increases the stress level of the custodial parent, all else is not equal); see also *Chambers*, *supra* note 127, at 2601 (explaining that conflict created by increased parental contribution may not be worth the benefit).

<sup>204</sup> See *FURSTENBERG & CHERLIN*, *supra* note 187, at 75.

<sup>205</sup> See *Johnston*, *supra* note 134, at 175.

<sup>206</sup> Maccoby and Mnookin found that legal conflict (and hence ongoing tension) was most



This is a particular problem for never-married parents. The increased conflict associated with collecting child support from never-married fathers tends to increase parental stress enough to outweigh the benefits of the financial support.<sup>207</sup> Thus, it appears that judicially enforceable contact is beneficial only if it does not have to be judicially enforced. To the extent that state interference with vertical relationships increases the conflict and stress with which the custodial parent must deal, clear evidence suggests that state interference can do children more harm than good. If the justification for interfering with vertical relationships in single parent households is rooted in protecting children, it is time to rethink that justification.

## 2. *The Non-Custodial Parent's Interest in State Interference*

Other justifications for state interference with vertical relationships include state protection of the non-caretaking parent's interest. In the standard situation, the state restricts the mother's autonomy in the interest of protecting the father's parental rights. In order to evaluate this justification, one must remember that parenthood, particularly fatherhood, is a legal construct.<sup>208</sup> Neither common law nor the Due Process Clause from which negative parental rights emanate<sup>209</sup> supports the notion that blood connection bestows positive paternal rights.<sup>210</sup> The common law conclusively presumed that the husband of the mother was the father of the child,<sup>211</sup> and evidentiary rules prevented either the husband or the wife from testifying to

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positively correlated to paternal claims for more custody or visitation. Fathers were most likely to make such claims when they: (1) were concerned about the mother's caretaking ability, or (2) expressed hostility toward the mother. See MACCOBY & MNOOKIN, *supra* note 131, at 272-74. Courts often used joint custody as a means of resolving these disputes even though in most situations the child continued to reside with the mother. See *id.* Thus, the father was given legal rights as a way of pacifying him even though he did not bother to assume the responsibility that the court afforded him the privilege of assuming.

<sup>207</sup> See Sara McLanahan et al., *Child-Support Enforcement and Child Well-Being: Greater Security or Greater Conflict*, in CHILD SUPPORT AND CHILD WELL-BEING 239, 254 (Irwin Garfinkel et al. eds., 1994).

<sup>208</sup> See *supra* text accompanying notes 72-81; *infra* text accompanying notes 209-14.

<sup>209</sup> For parental rights cases decided under the substantive due process doctrine, see *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1971); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). For parental rights cases decided under the procedural due process doctrine, see *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Department of Soc. Serv.*, 452 U.S. 18 (1981); *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977).

<sup>210</sup> Deborah Forman suggests that the idea of biological connection as the basis for parenthood is deeply rooted in our culture. See Forman, *supra* note 76, at 988-90. However, it does not appear to be deeply rooted in our common law or constitutional jurisprudence.

<sup>211</sup> See Mary Louise Fellows, *The Law of Legitimacy: An Instrument of Procreative Power*, 3 COLUM. J. GENDER & L. 495, 498-99 (1993).

non-access.<sup>212</sup> The Supreme Court upheld the constitutionality of this kind of presumption in *Michael H. v. Gerald D.*<sup>213</sup> Thus, a mere genetic tie to a child is insufficient grounds to restrict the parental rights of another biological parent who has taken primary responsibility for the child.<sup>214</sup>

The right to restrict another parent's autonomy might come, however, from the combination of a biological tie and some form of social relationship, perhaps in the form of financial support or actual contact with the child.<sup>215</sup> The question one needs to ask about this justification is: Why? Only one-quarter of children in single parent households see their biological father *as often as* once a week.<sup>216</sup> Ten years after divorce, nearly two-thirds of children will have gone a full year without any contact with their father.<sup>217</sup> One-third of the children of divorce do not see their non-custodial parent on any sort of regular basis after the first year of separation.<sup>218</sup> Only one-sixth of children see their fathers at least once a week.<sup>219</sup> The great majority of children in "non-traditional" families—that is, approximately forty percent of the

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<sup>212</sup> See *id.* Lord Mansfield justified the presumption as "founded in decency, morality, and policy," *Goodright v. Moss*, 98 Eng. Rep. 1257, 1258 (K.B. 1777), presumably because it served to protect the child from the stigma and poverty of illegitimacy. See Fellows, *supra* note 211, at 500. As Fellows notes, however, if a child had African-American features, nineteenth-century courts refused to apply the marital presumption. See *id.* at 500–01. Racial purity was, apparently, a more important state interest than protection of the mixed race child.

<sup>213</sup> 491 U.S. 110, 130 (1988) (deeming constitutional California's conclusive presumption that the man married to the woman who gave birth to the child is the child's father).

<sup>214</sup> As Dorothy Roberts demonstrates, an African-American's paternal lineation has never been particularly important either to his or her legal status as a non-white person or to his or her social status in the African-American community. It was the genetic tie to a slave mother that determined an African-American's legal status, and the African-American community itself has never placed a primacy on the genetic tie as a source of identity. See Roberts, *supra* note 135, at 210–15.

<sup>215</sup> Of course, at a purely doctrinal level, the Supreme Court rejected this idea in *Michael H.* where the biological father, who had both supported the child financially and lived with the child and her mother in a "family-like relationship," was afforded no right to maintain his relationship to the child when the state conferred paternal status on the legal husband of the mother. See *Michael H.*, 491 U.S. 110.

<sup>216</sup> See Judith A. Seltzer, *Relationships Between Fathers and Children Who Live Apart: The Father's Role After Separation*, 53 J. MARRIAGE & FAM. 79, 85 (1991).

<sup>217</sup> See Frank F. Furstenburg, Jr., *Good Dads—Bad Dads: Two Faces of Fatherhood*, in *THE CHANGING AMERICAN FAMILY AND PUBLIC POLICY* 190, 203 (Andrew J. Cherlin ed., 1988). More recently, Maccoby and Mnookin found what may be more father involvement. Three-and-one-half years after the divorce, only 14% of the fathers in their study had gone one year without seeing their children. See MACCoby & MNOOKIN, *supra* note 131, at 274.

<sup>218</sup> See Frank F. Furstenburg, Jr. & Christine Winquist Nord, *Parenting Apart: Patterns of Childrearing After Marital Disruption*, 475 J. MARRIAGE & FAM. 893 (1985).

<sup>219</sup> See Furstenberg, *supra* note 217, at 203.

children in this country<sup>220</sup>—fail to have anything like the vertical relationships that were described in Part II.B with their non-custodial parent. It is the interest of these absentee parents that we protect when we interfere with the parental rights of caretaking mothers.<sup>221</sup>

Recall the reasons for legal protection of vertical relationships. From the adults' perspectives, there were several: children provide a bond of love; child rearing enables a form of self-expression; and caring for children fosters a level of self-sacrifice that helps develop a nobler sense of self. All of these benefits are necessarily diminished with limited contact. For instance, an absentee parent may take solace in knowing that his child loves him, but the quality of love is proportional to the amount of time he has to give and receive it. As the primary caretaker father who took day-to-day responsibility for his children stated: "I know my kids now. You can't love anyone you don't know. . . . And they love me . . . ."<sup>222</sup> The less a noncaretaker is with his child, the less significant the love that either he or the child receives.

An absentee father is unlikely to use his relationship with his child as an outlet for self-expression or as a vehicle for fostering selflessness. As the Supreme Court noted in *Smith*, it is the "intimacy of daily association" that "'promot[es] a way of life' through the instruction of children."<sup>223</sup> Parents transmit values not so much by what they say, but by what they do, how they live, and how they interact with others. It is very difficult for this sort of education to be provided in weekly sessions.<sup>224</sup> Accepting financial responsibility for one's children may connote some freedom to accept obligation as a form of self-expression,<sup>225</sup> but such limited engagement hardly seems like a way in which we can meaningfully "fulfill and

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<sup>220</sup> See Behrman & Quinn, *supra* note 122, at 4.

<sup>221</sup> Of course, preservation of positive paternal rights also protects the interests of those non-custodial fathers who actively participate in their children's lives. As will be explained later, letting these men restrict the autonomy needs of custodial mothers may be perfectly appropriate, but only if those fathers show that they have a substantial emotional connection to their children.

<sup>222</sup> SWIGART, *supra* note 104, at 118–19.

<sup>223</sup> *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231–33 (1972)).

<sup>224</sup> To the extent non-custodial parents can provide this sort of education in weekly sessions, one has to ask whether the "right" that the non-custodial parent may have to inculcate values should obstruct the custodial spouse's "right" to prohibit him from doing so. Moreover, as explained earlier, *see supra* text accompanying notes 107–11, the child also has an interest in a uniform value structure allowing her to develop her own sense of right and wrong. A child's interest in uniformity may outweigh the non-custodial parent's right to inculcate values.

<sup>225</sup> See *supra* notes 102–03 and accompanying text. Of course, if child support is a state-imposed obligation, accepting financial responsibility for children seems to serve a less expressive function.

express [our] deepest values about how life is to be lived.”<sup>226</sup> Absentee parenthood also requires less selflessness. Children may be “greed machines,”<sup>227</sup> but one only has to give when one is there. If a parent is not there, he has no opportunity “to get into self-sacrifice.”<sup>228</sup> Thus, the benefits of vertical relationships are seriously curtailed for the absentee parent, and it is unclear why the law should be so willing to restrict the caretaker’s autonomy in order to protect his potential interest in the connection to his child.<sup>229</sup> Yet as we will see in both the unwed parent adoption context and in the custody modification context, the law is often perfectly willing to protect ephemeral paternal connection at the expense of maternal autonomy.

#### a. *Unwed Parent Adoptions*

In *Augusta County Department of Social Services v. Unnamed Mother*, the biological and gestational mother, a divorced mother of four who knew who the father of her child was and knew him to be a married friend of the family with children of his own, claimed a right not to disclose the name of the father in the adoption proceedings.<sup>230</sup> As she told the court: “I am the only one who really knows the whole story. And I am doing what I think is best for my children, myself and the baby.”<sup>231</sup> The court rejected her claims and ruled that she had to notify the

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<sup>226</sup> Richards, *supra* note 101, at 28.

<sup>227</sup> SWIGART, *supra* note 104, at 118.

<sup>228</sup> *Id.* at 119.

<sup>229</sup> Some might argue that a father’s financial responsibility for his offspring brings with it certain paternal rights or privileges. Many courts and several statutes, wary of allowing visitation rights to be “bought” and “sold,” resist this argument by being careful not to tie parents’ visitation rights to child support. See IRA MARK ELLMAN ET AL., *FAMILY LAW, CASES, TEXT, PROBLEMS* 364 (2d ed. 1991). Other courts are more comfortable with the potential commodification dangers associated with treating visitation relationships as monetized goods. See *id.* at 365. Evidence suggests that at divorce many parents already commodify their relationships with their children by trading custodial rights and obligations for income. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 969 (1979). That being said, given how few women actually want to, see Chambers, *supra* note 127, and do receive child support, see BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, SER. P-23, NO. 167, *CHILD SUPPORT AND ALIMONY: 1987*, at 4 (1990) (stating that approximately 50% of women awarded child support payments receive full payment), it may be time to rethink the basis of parental financial obligation. Although a full critique of paternity doctrine and child support is beyond the scope of this Article, I would argue that just as demonstrated commitment to a child, rather than blood, should give rise to parental rights, demonstrated acceptance of responsibility to a child, rather than genetic connection, should give rise to parental financial responsibility. See *infra* text accompanying notes 318–27.

<sup>230</sup> See *Augusta County Dep’t of Soc. Serv. v. Unnamed Mother*, 348 S.E.2d 26 (Va. Ct. App. 1986).

<sup>231</sup> *Id.* at 27.

biological father through publication.<sup>232</sup> Note that if this woman was terminating the pregnancy instead of carrying it to term, she would not have to notify the father at all.<sup>233</sup> Note, also, that if this woman were married instead of divorced, her husband would be presumed to be the father of the child and the biological father would have no constitutional right to know or prove otherwise.<sup>234</sup> Note, finally, that if this woman were married and making any other decision with regard to what was best for any of her children, the court would presume that she was acting in her child's best interest<sup>235</sup> and would not interfere even if the parents disagreed between themselves.<sup>236</sup> Failing to note any of this inconsistent doctrine, the court in *Augusta County* discounted the mother's autonomy interests in protecting her own and her children's well-being so that it could preserve the potential relationship interest of a man who did not even know he was the father of a child with whom he may not have wanted to pursue a relationship.

Other unwed parent adoption cases demonstrate how the law is willing to grant vertical relationship rights to a father based on his willingness to establish a relationship with the mother, regardless of whether she wants to maintain a relationship with him. In other words, the law protects his desire to form relationships and ignores her desire to be free of them. In *In re the Adoption of Baby Girl S.*, a New York court granted parental rights to a biological father who had offered to marry and financially support the mother of the child put up for adoption.<sup>237</sup> The mother did not want to marry the biological father and did not want him involved with her pregnancy because she was worried it would create problems in her divorce and possibly lead her to lose custody of her nine-year-old son.<sup>238</sup> The court assumed that the man's offers of support were sufficiently comparable to the woman's gestational contribution to endow him with positive paternal rights and ignored her desire not to tell him.<sup>239</sup> The court completely

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<sup>232</sup> See *id.* at 29.

<sup>233</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 887–88 (1992) (recognizing women's need for autonomy).

<sup>234</sup> See *Michael H. v. Gerald D.*, 491 U.S. 110 (1988).

<sup>235</sup> See *Parham v. J.R.*, 442 U.S. 584 (1979).

<sup>236</sup> See *Kilgrow v. Kilgrow*, 107 So.2d 885 (Ala. 1959) (refusing to interfere in child rearing decisions of an intact family).

<sup>237</sup> See *In re the Adoption of Baby Girl S.*, 535 N.Y.S.2d 676, 678 (1988).

<sup>238</sup> See *id.*

<sup>239</sup> The court took care to mention that he "told [the mother] that he loved her" as if that statement in and of itself was important enough to confer parental rights. See *id.* Justice Stevens demonstrated a similar attitude in *Lehr v. Robertson* when he noted that Mr. Lehr, who was claiming the right to veto a stepparent adoption, never offered to marry the mother. See *Lehr v. Robertson*, 463 U.S. 248, 252 (1983). Justice Stevens apparently did not contemplate the possibility that the mother may not have wanted to marry him.

disregarded the very real possibility that the desire to be free of the horizontal relationship is what led the woman to put the child up for adoption. Giving parental rights to this father—who had no physical or emotional connection to the child—made the biological mother vulnerable both to vertical intimacy with the child (that she may have wanted to avoid) and horizontal connection to and manipulation by the biological father. For a woman yearning to be free of these connections, ignoring her interests in putting the child up for adoption once again renders her need for autonomy invisible.<sup>240</sup>

Some commentators have argued that we should protect paternal privileges because, if the father has demonstrated a commitment to the mother, rewarding him with privileges honors the importance of that commitment<sup>241</sup> and encourages men to be more engaged in the process of child rearing.<sup>242</sup> “Children,” Barbara Woodhouse argues, “need parents who take responsibility for each other’s well-being as well as for their children.”<sup>243</sup> “The notion of isolated parent-child dyads is largely a legal construct. All families . . . might benefit from a reshaping of cultural and legal expectations in a more family-centric and less individualistic mold, to measure parenthood by a yardstick of commitment and cooperation among adults as well as towards children.”<sup>244</sup> To Woodhouse, the law’s focus on individual parental rights ignores the inevitably interdependent nature of families.<sup>245</sup>

Woodhouse is correct in suggesting that children benefit from parents who take responsibility for each other.<sup>246</sup> As established, functioning families are emotionally beneficial to their members in large part due to the enriching benefits of

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<sup>240</sup> Contrast this result with *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), in which the Tennessee Supreme Court granted a sperm donor the right to destroy a fertilized ovum over the objection of the egg donor who wanted to donate the fertilized egg to another couple. The court held it would be repugnant to order the sperm donor to bear the psychological consequences of paternity against his will. *See id.* at 603. The Court in *Augusta County* did not even consider what negative psychological consequences might follow involuntary maternity. *See Augusta County Dep’t of Soc. Serv. v. Unnamed Mother*, 348 S.E.2d 26 (Va. Ct. App. 1986). This is particularly troubling given the evidence that pregnancy and the social construction of motherhood are likely to make a biological mother’s negative psychological consequences considerably more grave than a biological father’s. *See Becker, supra* note 175, at 142–53 (stating that women experience motherhood more intensely than fathers experience fatherhood).

<sup>241</sup> *See* Woodhouse, *supra* note 9. Woodhouse emphatically rejects the discourse of “rights” in this context because a notion of “rights” “rejects children’s needs for adult responsibility and increases adversariness among adults.” *Id.* at 1811.

<sup>242</sup> *See* Forman, *supra* note 76, at 988–1000.

<sup>243</sup> Woodhouse, *supra* note 9, at 1812.

<sup>244</sup> *Id.* at 1784 (citations omitted).

<sup>245</sup> *See id.* at 1810.

<sup>246</sup> Interdependent family relationships tend to produce the happiest, most stable children. *See FURSTENBERG & CHERLIN, supra* note 187, at 68–70.

interdependence. Indeed, it is interdependence that serves as the basis for affording intact families protection from governmental interference.<sup>247</sup> The problem with Woodhouse's interdependent approach, however, is that parents only try to assert positive parental rights against each other when the interdependence has dissolved. As Deborah Forman has noted "at the time . . . [of the assertion of positive parental rights] no interdependent *family* really exists. The court's emphasis on individual rights does not cause the breakdown of these families or prevent them from forming; real interpersonal conflicts do."<sup>248</sup> Moreover, in many cases, the interdependence never existed. Many of the children born in this country are the result of dating relationships that, one can assume, had not reached a substantial level of interdependence.<sup>249</sup>

Deborah Forman's alternative proposal for paternal rights roots the protection of unwed father's rights in biology in order to encourage men to think of themselves as caretaking fathers, not just as financial obligors or sperm donors.<sup>250</sup> Forman argues that by protecting a noncaretaking father's right to develop relationships with his children, the law sends a symbolic and substantive message with regard to paternal caretaking.<sup>251</sup> Protecting the right encourages men to develop relationships. As Forman herself notes, however, the bestowal of paternal rights seriously compromises the mother's privacy and autonomy.<sup>252</sup> To justify this, Forman suggests that the courts should make sure that fathers have demonstrated a sufficient commitment to their children before awarding these rights.<sup>253</sup>

The problem is that providing an opportunity to demonstrate that paternal commitment also necessarily interferes with the caretaker's autonomy. This is not an inconsequential concern. Mothers commonly exercise their common law right to bestow paternal rights on their husbands and thereby keep their nuclear families intact. One study by physicians doing organ research suggested that five to twenty

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<sup>247</sup> See *supra* Part II.A.

<sup>248</sup> Forman, *supra* note 76, at 1012 (emphasis added).

<sup>249</sup> See David L. Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614, 1619 (1982). In these situations, Woodhouse would confer paternal privileges not on the biological father, but on the person who supported the mother during pregnancy and after. See Woodhouse, *supra* note 9, at 1844-51. However, it is not clear what the law should do in the absence of such a supportive (presumably male?) person. Need the law assign parental privilege to anyone else? How can it justify assigning those privileges to a male support person but not to the mother's other friends and family? If a biological mother's sister is more supportive than her new boyfriend, should the sister get greater privileges? What about the mother's female lover? Should we assume that a sexual bond with a primary caretaker gives one more privilege with regard to a child that is not the result of that sexual bond? Why?

<sup>250</sup> See Forman, *supra* note 76, at 988-1000.

<sup>251</sup> See *id.* at 991.

<sup>252</sup> See *id.* at 1000.

<sup>253</sup> See *id.*

percent of the children in their sample were not biologically related to their legal fathers.<sup>254</sup> A woman also may want to keep her pregnancy a secret for a number of reasons,<sup>255</sup> not the least of which is to protect herself from domestic violence.<sup>256</sup> When courts protect a man's right to develop a relationship with his biological offspring, the mother, who may well have no more than a dating relationship with the father,<sup>257</sup> is often left geographically and relationally bound to the father so that he can maintain a relationship that will, in all likelihood, consist of no more than weekly visits.

### b. *Custody Modification*

Custody relocation cases also provide clear examples of courts' willingness to protect men's often ephemeral relational interest, while ignoring or dismissing women's need for autonomy. In determining whether a custodial parent should be able to move, most courts again rely on the ambiguous and discretionary best interest of the child standard.<sup>258</sup> With that discretion comes a clear tendency to ignore women's needs. Courts tend to discount women's autonomy both when they focus solely on the children's best interests and when they ostensibly recognize that parental interests can be relevant to children's best interests. First, the courts that concentrate on the child's interest focus on the child's interest in maintaining a relationship with the non-custodial parent.<sup>259</sup> This makes sense. Children always

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<sup>254</sup> See BARBARA KATZ ROTHMAN, *RECREATING MOTHERHOOD* 225 (1989). Other studies estimate the percentage is as low as five percent. See *id.*

<sup>255</sup> See *In re Kirchner*, 649 N.E.2d 324, 327 (Ill. 1995) (regarding a mother who misled the father into believing that the baby was dead after the father abandoned her); *Robert O. v. Russell K.*, 604 N.E.2d 99 (N.Y. 1992) (regarding a father who did not know about his biological child's adoption until the child was 10 months old); *Augusta County Dep't of Soc. Serv. v. Unnamed Mother*, 348 S.E.2d 26 (Va. Ct. App. 1986) (requiring notice to father by publication).

<sup>256</sup> This was the reasoning on which the Supreme Court relied in striking down the spousal notification provision in *Planned Parenthood v. Casey*, 505 U.S. 883, 887–95 (1992). Forcing women to tell their sexual partner that they were pregnant was found too dangerous to a woman's health. See *id.*

<sup>257</sup> See Chambers, *supra* note 249, at 1619.

<sup>258</sup> Different states use different formal standards to adjudicate these issues, but most states rely on the best interest test and differ only on who has the burden of proof in establishing whether a move will be in the child's best interest. See Janet M. Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, 31 U. LOUISVILLE J. FAM. L. 791, 804–31 (1992). The two notable exceptions, at opposite ends of the spectrum, are New York, which requires the parent who wants to move to show exceptional circumstances necessitating the move, see *id.* at 804–10, and Minnesota, which requires the non-custodial parent to show that the move will cause actual detriment to the child, see *id.* at 828–31.

<sup>259</sup> See *Costa v. Costa*, 429 So.2d 1249 (Fla. Dist. Ct. App. 1983); *Sambola v. Sambola*, 493 So.2d 206 (La. Ct. App. 1986); *In re Marriage of Meier*, 595 P.2d 474 (Or. 1979).



have an abstract interest in maintaining relationships with their parents,<sup>260</sup> and, compared to what are only the potential benefits of a new home for the child, the benefits of maintaining the non-custodial parent relationship are less speculative. The non-custodial parent, usually the man, is the beneficiary of the courts' desire for surety and consistency.

The same problem occurs when courts acknowledge that they should take into consideration the interests of both parents. The child's interest in maintaining contact with the non-custodial parent and the non-custodial parent's interest in a relationship with his child fold into one interest that benefits two of the three relevant parties. The custodial parent's interest is thus easily outweighed by the interests of the other two. As a New Jersey court recognized, however, in most cases, "the best interests of a child are so interwoven with the well-being of the custodial parent, the determination of the child's best interests requires that the interests of the custodial parent be taken into account."<sup>261</sup> In reality, therefore, because: (1) the child always has an interest in maintaining a relationship with the non-custodial parent, and (2) the child and the custodial parent's interest so readily overlap, the child's interest drops out. If the non-custodial parent has worked to establish a relationship, the loss of which will hurt the child, the non-custodial parent's interest in maintaining the relationship will be as one with the child's interest. On the other hand, a child's interest in moving will be dependent on the importance of the move to the well-being of the custodial parent. If restricting the custodial parent's autonomy and preventing her from exercising her own capacity for emotional and financial growth adversely affects her well-being, the child will suffer. Thus, courts could develop a much more honest<sup>262</sup> and consistent test<sup>263</sup> if they just weighed the interests of both parents against each other, with the weight

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<sup>260</sup> Experts will always be available to testify that in an ideal world a child would be able to maintain contact with both parents. See *Costa*, 429 So.2d at 1252. The problem is that, in situations in which divorced parents are already in court fighting about this issue, the situation is, by definition, far from ideal.

<sup>261</sup> *Cooper v. Cooper*, 491 A.2d 606, 612 (N.J. 1984); see also JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, *SURVIVING THE BREAKUP* 114, 224-25 (1980) (presenting research regarding the parent-child relationship and coping mechanisms after divorce).

<sup>262</sup> As noted above, the best interest test has been widely criticized for its inevitable incorporation of judicial bias and paternalism. See *Chambers*, *supra* note 194, at 491.

<sup>263</sup> Different states and often different courts within states have come to widely varying results in these cases. Compare *In re Marriage of Nodot*, 401 N.E.2d 1189 (Ill. App. Ct. 1980) (refusing removal), with *Arquilla v. Arquilla*, 407 N.E.2d 948 (Ill. App. Ct. 1980) (permitting removal). See also *Leslie v. Leslie*, 579 N.Y.S.2d 164, 165 (N.Y. App. Div. 1992) ("It is well established that in the absence of exceptional circumstances a custodial parent may not, by relocating to a distant locale, deprive the noncustodial parent of reasonable visitation."); *Lozinak v. Lozinak*, 569 A.2d 353 (Pa. Super. Ct. 1990) (forcing the mother to choose between moving to be with new husband and continued custody).

to be afforded the non-custodial parent's interest in a vertical relationship dependent on the strength of the pre-existing relationship.

To the extent that such a test seems to minimize the interests of the children, remember that courts are powerless to actually prevent parents from moving. All a court can do is modify a custody decree. A child may have an interest in the custodial and non-custodial parent staying close to each other, but the non-custodial parent can move away without any incident and the custodial spouse can move as long as she is willing to sacrifice custody.<sup>264</sup> The child's interests are not served by either move, but the child's interests do not govern because we do not force parents to stay with their children. We do not even force parents to visit their children.<sup>265</sup> By balancing the interests of the parents against each other, courts can incorporate the children's interests to the extent they always have and in the same way parents do. In the great majority of circumstances, children's interests are served by serving the interests of the parents.<sup>266</sup> That is the nature of intimacy.

Shifting the focus from the child to the parents' interests should help the court acknowledge the importance of custodial spouse autonomy. For many divorced women, the ability to act and feel autonomous is critical to their emotional and financial happiness. Women's standard of living drops dramatically after divorce<sup>267</sup> and stays low for as long as they remain unmarried.<sup>268</sup> Remarriage is the single best way for divorced women to improve the economic well-being of both themselves and their children.<sup>269</sup> To the extent that protecting the positive parental rights of the non-custodial parent decreases the custodial parent's freedom to remarry, the law

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<sup>264</sup> Janet Bowermaster made this point first. See Bowermaster, *supra* note 258, at 839–42.

<sup>265</sup> Some have argued that courts should have precisely that authority. See Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1437–40 (1991).

<sup>266</sup> Naomi Cahn has also recognized that children and parents' interests often overlap. See Cahn, *supra* note 132, at 49. Depending on the age of the child, it might also be appropriate for the court to ask the child about his or her own interests. To the extent that children can articulate their own interests and courts are capable of ascertaining whether those articulated interests have been unduly influenced by one of the parents, children deserve to be heard. See *Garska v. McCoy*, 278 S.E.2d 357, 363 (W. Va. 1981) ("Where a child is old enough to formulate an opinion about his or her own custody the trial court is entitled to receive such opinion and accord it such weight as he feels appropriate."). For the problems with allowing the child's opinion to control, see *Rose v. Rose*, 340 S.E.2d 176 (W. Va. 1985), in which the court upheld an order switching custody to the father based on the child's testimony that he did not like his mother's boyfriend. The child said he did not like the boyfriend after his father had told him that the boyfriend was the reason his parents got divorced. See *id.* at 177.

<sup>267</sup> See note 184 and accompanying text.

<sup>268</sup> See Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 DEMOGRAPHY 485, 491 (1985).

<sup>269</sup> See *id.*

sacrifices both the custodial parent's and the children's economic well-being. Moreover, for those custodial mothers who do not remarry, their own labor income is the primary source of family income.<sup>270</sup> Restricting women's ability to earn more money not only hurts them, it hurts the children for whom they care.<sup>271</sup>

Respecting women's autonomy needs also means rejecting the practices of placing the burden of proof on the custodial parent who wants to change the status quo<sup>272</sup> and including geographical restrictions in divorce decrees.<sup>273</sup> Such practices confirm the view that women care primarily about interdependence, not growth as independent beings. As suggested, however, divorced women often have a critical need to grow on their own. They have increased financial needs (hence they may want to move for a new job),<sup>274</sup> increased caretaking needs (hence they may want to move to be closer to family),<sup>275</sup> and increased desires for horizontal relationships (hence they may want to move to be with a new partner).<sup>276</sup> Chances are also good

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<sup>270</sup> See *id.* Maccoby and Mnookin's findings deserve special mention: "[F]or most . . . families . . . divorce impose[s] a significant reallocation of gender roles . . . . [T]he father had assumed primary responsibility for the financial support . . . . After the divorce, this is no longer the case . . . . [C]ustodial mothers become the primary source of support for their children . . . even in those households where child support is paid in full." MACCOBY & MNOOKIN, *supra* note 131, at 271.

<sup>271</sup> In those rare situations in which men do have custody of the children and wish to move, courts rarely restrict the father's autonomy. In six of the eight father-removal cases studied by Professor Bowermaster, courts allowed the father's requested relocation, and, in the remaining two cases, the court remanded with rules favorable to the father. See Bowermaster, *supra* note 258, at 847.

<sup>272</sup> See Bowermaster, *supra* note 258, at 810–21. For cases where the custodial parent bore the burden of proof, see *Tantilla v. Tantilla*, 382 P.2d 798 (Co. 1963); *Leslie v. Leslie*, 579 N.Y.S.2d 164 (N.Y. App. Div. 1992).

<sup>273</sup> See *Bell v. Bell*, 572 So.2d 841, 844 (Miss. 1990) (recognizing that geographical restrictions in divorce decrees were becoming more common); *In re Marriage of Sheley*, 895 P.2d 850 (Wash. Ct. App. 1995) (prohibiting the custodial parent from moving out of eastern Washington state).

<sup>274</sup> See *Fingert v. Fingert*, 271 Cal. Rptr. 389 (Cal. Ct. App. 1990) (permitting custodial mother to move from California to Chicago, to take over her father's business because he was retiring); *In re Marriage of Sheley*, 895 P.2d 850 (having previously stayed home with children, custodial parent wanted to move from Seattle to Texas to a job that was offering \$50,000 per year).

<sup>275</sup> See *Ramirez-Barker v. Barker*, 418 S.E.2d 675 (N.C. Ct. App. 1991) (moving to California to be near family so that they could help with caretaking); *In re Marriage of Sheley*, 895 P.2d 850 (moving to Texas would have put custodial parent closer to her family who could help with caretaking).

<sup>276</sup> See *In re Marriage of Davis*, 594 N.E.2d 734 (Ill. App. Ct. 1992) (new spouse had new job outside of Illinois); *In re Berk*, 574 N.E.2d 1364 (Ill. App. Ct. 1991) (The mother's new husband had requested a transfer before he met her. When the transfer came through, he had to move or lose his job.).

that these women have already made at least one move in order to accommodate the desires of their now ex-husbands. Women are more likely than men to move away from their families when they get married.<sup>277</sup> Wives are also much more likely to follow their husbands' jobs than are husbands to follow their wives' jobs.<sup>278</sup> When, after divorce, it is the wife's turn to move, courts routinely make her choose between her children and herself, a choice she never forced her husband to make. By refusing to recognize the needs that divorced women have for autonomy after divorce, courts penalize them for having invested in interdependence in the first place. Courts tie these women to places they do not want to be and to relationships they wish to be free of, all in the name of protecting a paternal vertical relationship that often exists more as a matter of legality than reality.

Finally, the law's discounting of women's autonomy interests can be seen in child custody modification decisions that do not involve physical relocation. In *Friederwitzer v. Friederwitzer*, the court took custody away from the mother because of what it saw as "the lesser concern of the mother for the emotional well-being of her children than for her own life style."<sup>279</sup> The court failed to give any weight to the mother's need for her own lifestyle or to the inevitable overlapping interests of the custodial parent and the children. Other courts have been willing to take custody away from women who were making other autonomy-enhancing decisions because the court presumed that raising children and such autonomy-enhancing behavior were mutually exclusive. The trial court in *Ireland v. Smith* awarded custody to the biological father of the child because the mother had received a scholarship and decided to pursue studies at the University of Michigan.<sup>280</sup> The trial court found "no way that a single parent, attending an academic program at an institution as prestigious as the University of Michigan, [could] do justice to their studies and to [the] raising of an infant child."<sup>281</sup> Although this case was overturned on appeal,<sup>282</sup> the trial court's decision is particularly disturbing. Not only did the court completely discount the importance of the custodial parent taking care of her own needs, it awarded custody to a biological father who did not seek visitation for the first year of the child's life, had never provided any financial support for the child, had never assumed sole obligation for taking care of the child, and who was planning on having his mother care for the child.<sup>283</sup> He had the most minimal of established relationship interests with which

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<sup>277</sup> See Bowermaster, *supra* note 258, at 345 n.271.

<sup>278</sup> See *id.*

<sup>279</sup> *Friederwitzer v. Friederwitzer*, 432 N.E.2d 765, 769 (N.Y. 1982).

<sup>280</sup> See *Ireland v. Smith*, 542 N.W.2d 344 (Mich. Ct. App. 1995).

<sup>281</sup> *Id.* at 349.

<sup>282</sup> See *id.* at 344.

<sup>283</sup> See *id.* at 348-49.

to combat her need for autonomy, but the court still protected his right to develop a better relationship.

### C. Summary

Thus, in the horizontal and vertical relationship contexts, we see the inverse gendered effects of state interference. Horizontally, women need less state deference. Vertically, women need more state deference. Women receive relatively little benefit from the state's refusal to interfere in horizontal relationships because the interdependence fostered by state deference does little to serve women's needs although it helps men feel a sense of connection. Women's autonomy interests would benefit from comparable state deference to vertical relationships, but the state continually interferes with mothers' negative parental rights, and it does so in the name of protecting men's desire for connection to others. Deborah Forman argues that the law should interfere to protect men's desire for relationships with their children because it "serves feminist goals by infusing notions of commitment and responsibility into the concept of rights . . . by encouraging men to take an active and meaningful role in parenting their children."<sup>284</sup> Protecting positive paternal rights only serves some feminist goals, however. It severely hinders those feminist goals aimed at encouraging women to free themselves from seemingly obligatory interdependence and connection, particularly to men with whom they no longer wish to associate at an intimate level. Protecting positive paternal rights also undermines cultural feminist goals because it undervalues the caretaking that women do by failing to recognize how much more women invest in their children. If the law really valued women's caretaking work, it would afford them negative legal protection based on their caretaking responsibilities.<sup>285</sup> As noted above, women do vastly more caretaking than men,<sup>286</sup> but the law barely rewards them for

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<sup>284</sup> Forman, *supra* note 76, at 1043.

<sup>285</sup> To the extent that the law makes custody decisions based on who has invested more in caring for the child, *see generally infra* text accompanying notes 318–19, the law does respect the caretaking that women do, but the law does not sufficiently respect the caretaking work that women do to allow it to serve as a reason for deferring to an unmarried woman's parenting decisions. The law does not allow her to be as good a parent as she was before a divorce because, at divorce, the primary caretaker loses the freedom to parent.

<sup>286</sup> Maccoby and Mnookin note that:

In a substantial majority of our [subjects] we believe the mother had primary managerial responsibility for the child-rearing functions before the divorce. Although fathers were often involved in the day-to-day lives of their children, we judge (on the basis of other studies as well as our own) that on average they usually spent much less time alone with the children and did not normally share equally in the responsibility of the child care on an everyday basis.

that. Instead, it protects biological fathers by granting them positive parental rights that preserve what are often abstract desires for connection and ignores the autonomy interests that would be served by taking women's negative parental rights seriously.

#### IV. PROPERTY IN RELATIONSHIP: A FEMINIST SOLUTION

The analysis in Part II suggested that both horizontal and vertical relationships need freedom and space in the form of legal protection and deference if they are to flourish. The state usually provides this space in the horizontal context, but in the vertical context it does so only if the parents are married. As we saw in Part III, from the standpoint of women's needs, this inconsistent treatment of relationships is precisely backwards, but it does suggest a consistent pattern: The law tends to protect men's (often) latent desires for interconnection and intimacy at the expense of women's (often) latent desires for autonomy and independence. This Part will argue that it is possible for courts to redress the disturbing willingness to discount women's autonomy interests by recasting a custodial parent's interest in her relationship with her child, not as a liberty interest "more precious than any property right,"<sup>287</sup> but as an interest *as* precious as any property right. As Mary Ann Glendon has commented, "[i]n America, when we want to protect something, we try to get it characterized as a right . . . [W]hen we *specially* want to hold on to something[,] . . . we try to get the object of our concern characterized as a property right."<sup>288</sup> By analyzing parental claims as liberty interests, not property rights, courts have subjected those interests to the interpretive discretion implicit in the term "liberty"<sup>289</sup> and lost many of the benefits that property rhetoric affords. Among those benefits are: acknowledgement of hierarchical relationships, protection of investment, and respect for boundaried autonomy. All of these concepts, if applied properly, would allow courts to honor women's independence without sacrificing men's commitment to relationship.

The property models offered here are just that, models. I offer them as much for their heuristic potential as for their concrete application. My aim is to reorient our

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MACCOBY & MNOOKIN, *supra* note 131, at 268; *see also supra* notes 162, 173; FINEMAN, *supra* note 29, at 162 (stating that women do more caretaking than men regardless of whether the woman and man are sharing a household); Becker, *supra* note 175, at 153–58 (same); John P. Robinson, *Caring for Kids*, AM. DEMOGRAPHICS, July 1989, at 52.

<sup>287</sup> Santosky v. Kramer, 455 U.S. 745, 758 (1982).

<sup>288</sup> GLENDON, *supra* note 9, at 31.

<sup>289</sup> Property is not the most concrete of terms either, but as explained previously, a number of the concepts associated with property interests can be particularly beneficial to custodial parents with a vested interest in their relationship with their children.

thinking in this area in order to free us from the law's current tendency to assume: (1) that all parents are equally invested in and deserving of vertical relationships, and (2) that the privacy boundary thought critical to the traditional nuclear family's health must evaporate if the nuclear family does not exist.

### A. *A Defensive Defense of Property*

Before more fully explicating the benefits of property, it is worth giving an initial defense of the beleaguered property framework, particularly given the overwhelming sentiment against using property rhetoric in the family context.<sup>290</sup> First, anti-property arguments notwithstanding, many people think of themselves as owning their children. As Stephen Gilles writes, "[a]s against the rest of the world, the child is its parents' 'own.'"<sup>291</sup> Usually this possessive sense brings with it an ability, if not a privilege,<sup>292</sup> to influence strongly the thought, action, and behavior of those who are "ours."<sup>293</sup> This influence may be critical to a child's well-being. "It is only when individual parents relate to individual children that parents can think of their children as their own; most people are incapable of devoting themselves to children unless they can think of them in this way."<sup>294</sup> As Bruce Hafen notes, children often crave the sense of connection and belonging implicit in concepts of possession.<sup>295</sup>

Second, in adopting property paradigms, I am not suggesting that the property right actually attach to the child him or herself, but instead to the relationship. A parent should have an earned property interest in her relationship with her child. People worry about too much commodification of personal attributes because of the tendency of market rhetoric to extract the attribute or thing from the person.<sup>296</sup> Thus, contracts for surrogate mothers and prostitution are worrisome because the market tends to treat the person who is providing the service as nothing more than

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<sup>290</sup> See Cahn, *supra* note 132, at 49; Nedelsky, *supra* note 5, at 16; Regan, *Spouses and Strangers*, *supra* note 37, at 2350; Woodhouse, *supra* note 9, at 1811-14.

<sup>291</sup> Gilles, *supra* note 97, at 961.

<sup>292</sup> For the argument that a parent's ability to influence his or her child should be construed as a privilege, not a right, see James Dwyer, *Parent's Religion and Children's Welfare*, 82 CAL. L. REV. 1371, 1447 (1994).

<sup>293</sup> The ability to influence "our" family members is not limited to vertical familial relationships. Spouses and siblings routinely exercise this kind of control over each other.

<sup>294</sup> JEFFREY BLUSTEIN, *PARENTS AND CHILDREN* 37 (1982).

<sup>295</sup> See Hafen, *supra* note 53, at 31. Hafen tells the story of a girl who, after being told at school that she did not belong to anyone else, looked at her mother and asked, "I am yours aren't I, Mom?" *Id.*

<sup>296</sup> See Radin, *supra* note 2, at 1907.

the service itself instead of respecting the person's "personhood."<sup>297</sup> A prostitute or surrogate mother ceases to be a person and is seen only for the service that she provides. She is seen as a thing.

Treating vertical relationships as property interests is not likely to lead to a comparable tendency to treat children as things, however, because the relationship itself cannot be sold. Although the potential to develop and cultivate a relationship might be bargained over between the adults with an interest in such a relationship, the demand for the product is severely limited. Unlike markets for newborns, surrogate mothers, or prostitutes, demand for a legally enforceable claim for a relationship to a non-newborn child is very low. People want their "own" child; they do not want to share or even buy someone else's non-newborn. The lack of demand greatly diminishes the dangers of market rhetoric.<sup>298</sup>

Moreover, significant bargaining for relative parental rights already occurs in the divorce context. As Mnookin and Kornhauser concluded twenty years ago, "over some range of alternatives, each parent may be willing to exchange custodial rights and obligations for income or wealth, and parents may tie support duties to custodial prerogatives . . . ." <sup>299</sup> To the extent that such bargaining already exists, parents already commodify their relationships with their children. There is no reason to assume that the law's explicit recognition of an adult's property interest will exacerbate the harms of commodification, particularly if the law makes clear that property rights in vertical relationships, like some other property rights, are inalienable.<sup>300</sup> Thus, in this instance we can adopt property rhetoric without increasing the harms that come with commodification.

Third, it is important to recognize, as Carol Rose has, that:

Property and its rhetoric are far more subtle, nuanced, and accommodating than [many] caricature[s] would suggest. As it is actually used, property rhetoric reflects the central role of the institution of property in mediating human conflicts . . . . It also reflects a mode of thinking that has great power in revealing the underlying structures of human relationships . . . .<sup>301</sup>

To abandon the advantages of property rhetoric simply because it has served us ill

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<sup>297</sup> See generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (discussing the relationship between property rights and personhood).

<sup>298</sup> For a defense of the use of market rhetoric and commodification discourse in order to more fully value women's labor, see Silbaugh, *supra* note 2. In her article, Silbaugh uses economics discourse much as I use property discourse here—as a vehicle to more fully reward women for the work that they actually perform. See *id.* at 95, 99–104, 112–20.

<sup>299</sup> Mnookin & Kornhauser, *supra* note 229, at 969 (1979).

<sup>300</sup> See Calabresi & Malamed, *supra* note 1, at 1111–15. Contracts for inalienable goods are unenforceable. See *id.*

<sup>301</sup> Rose, *supra* note 4, at 2410.



in the past sends us into a discretionary world of ruleless adjudication that may deprive women of an opportunity to make their case in a language that the law can best understand. Just as rights rhetoric can help empower and connect groups that have traditionally been disenfranchised,<sup>302</sup> so can property rhetoric help give substantive content to the work that a woman does and the values that the family is supposed to embody.

Finally, to the extent that notions of hierarchy, investment, and boundary offend the collective, faith-based understanding of family with which people are more comfortable, one must keep in mind that property principles are offered here to help adjudicate disputes only if the family, as ideally defined, has ceased to, or never did, exist. Property may not be the way we think about our family relationships when our families are intact, but the question in this context is whether property is an appropriate framework for courts to use if the family is dissolved.

## B. *The Advantages of Property Theory*

### 1. *Hierarchy*

To be comfortable with property rhetoric, one must first be willing to accept what Stephen Munzer calls “the sophisticated conception of property;”<sup>303</sup> that is, one must understand property not as things but as relations. “[P]roperty consists in certain relations, usually legal relations, among persons or other entities with respect to things.”<sup>304</sup> A property right is a right vis-à-vis another person with regard to a thing. As indicated above, in the vertical relationship context, the “thing” at issue is not the child itself, but the relationship with the child. Thus, the res itself is inherently fluid, as are all relationships. The fluid, context-dependent nature of the res does not make it any less like property, however. For instance, water, a paradigmatically fluid res, has always been the subject of property law.<sup>305</sup> What property law provides is a framework for looking at the relative ability of different people to effect the res. The person with riparian property rights cannot completely control the stream because the stream is not completely controllable, but the riparian owner has more right to affect the stream than does her non-riparian neighbor.<sup>306</sup> Comparably, a person with primary parental rights cannot completely control a child, but she should have more influence over that child than a less invested parent.

A system of property rights establishes a hierarchy of entitlements to the res. In

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<sup>302</sup> See Minow, *supra* note 9, at 1874.

<sup>303</sup> STEPHEN R. MUNZER, A THEORY OF PROPERTY 16 (1990).

<sup>304</sup> *Id.* at 16.

<sup>305</sup> See, e.g., A. DAN TARLOCK, THE LAW OF WATER RIGHTS & RESOURCES (1994).

<sup>306</sup> For a general discussion of riparian rights, see ROGER CUNNINGHAM ET AL., THE LAW OF PROPERTY 424–26 (2d ed. 1993).

doing so, the system relies on the concept of relativity of title. Any number of people can have some colorable and enforceable claim to a res. The role of property law is to determine who has the best claim at any given time. Thus, in another example, the first finder of a wallet on the sidewalk has a better claim to the wallet than the person who comes upon that wallet later, but the true owner of that wallet has a better claim than does the first finder of the wallet, unless that owner is deemed to have abandoned her interest in the wallet.<sup>307</sup> Finder One, Finder Two, and True Owner all have valid claims to the wallet, but the law deems some claims stronger than others. The law rarely, if ever, requires that all three people share the wallet.

Yet sharing is precisely what the law has required with regard to vertical relationship rights. The law has assumed that once an adult has some relationship with a child, or even the potential for a relationship with a child, the res can be shared. As detailed above, however, court-enforced sharing is not necessarily good for the child, and it is clearly detrimental to the person who would otherwise have better title. Accepting relativity of title and the hierarchy it establishes in parental relationships would move courts away from their current tendency to assume that rights must be shared and towards an evaluation of the relative weight of the claims in interest. If the claims do not have equal weight, it may be perfectly appropriate to vest superior title in the person with the best claim.

Affording different weight to individual family members' claims may strike many as inappropriate precisely because, as suggested earlier, the family's alternative sense of justice relies on a collective, "to each according to his need, from each according to his ability" ethic.<sup>308</sup> Principles of forgiveness and faith suggest that families are supposed to share regardless of ability, contribution, or desert. We scorn distributional inequalities in such systems.<sup>309</sup> Family systems are broken (or never were working) if the law is involved in adjudicating vertical relationship rights, however. Faith and forgiveness may help the family function as a lasting interdependent unit, but, if that unit has been shattered, it may be necessary to abandon more ideal, collective concepts of justice in favor of rules that award benefits to those who most deserve them. What family law needs from property rhetoric is the acceptance of the unequal distributions implicit in a hierarchical system. In protecting men's potential for relationship at the expense of women's autonomy, courts have allocated rights based on the collective principle of equality even though the collectivity has dissolved.

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<sup>307</sup> "[T]he title of the finder is good as against the whole world but the true owner . . ." RAY A. BROWN, *THE LAW OF PERSONAL PROPERTY* 25 (3d ed. 1975); *see also* JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 105 (3d ed. 1993).

<sup>308</sup> *See supra* note 56.

<sup>309</sup> *See* JENNIFER HOCHSCHILD, *WHAT'S FAIR? AMERICAN BELIEFS ABOUT DISTRIBUTIVE JUSTICE* 32, 48-49, 107 (1981).

## 2. *Investment Theory*

As Jennifer Hochschild has analyzed from the standpoint of what Americans currently believe about distributive justice<sup>310</sup> and as Jennifer Nedelsky has analyzed from an American historical standpoint,<sup>311</sup> some distributional inequalities are acceptable and perhaps even desirable.<sup>312</sup> We tend to see distributional inequalities as permissible byproducts of private property when there is some acceptable theory of desert that explains the disparity in distribution. Investment in relationship could be one such legitimating theory. By scorning theories of desert in family law, courts blind themselves to the overwhelmingly greater amount of work that women perform in families.<sup>313</sup> Accepting theories of desert would encourage the law to recognize and reward the work that women do.

Property law thrives on evaluating relative claims of desert. As David Ellerman has written, labor desert theory is the principal normative theory of property.<sup>314</sup> Family law need not abandon this norm; it needs to reevaluate what counts as labor.<sup>315</sup> As suggested above, intimacy is work. Indeed, John Locke's maxim that "'tis labor that puts the difference of value on every thing"<sup>316</sup> seems particularly persuasive in the context of relationship. A relationship is worth more the more one

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<sup>310</sup> See *id.* (discussing overall American views on distribution of wealth and status).

<sup>311</sup> See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 205–08, 223–31 (1990).

<sup>312</sup> This is the theory that Professor Regan uses against the use of property rhetoric in the horizontal context when he argues that an acceptance of inequality leads to undercompensation of women at divorce. See Regan, *Spouses and Strangers*, *supra* note 37, at 2356–61. I am turning Regan's argument around in the vertical relationship context, arguing that an acceptance of inequality would lead to acceptable compensation for women who have disproportionately invested in their children.

<sup>313</sup> This work includes the work of intimacy, see FINEMAN, *supra* note 29, at 162 (stating that "intimacy and its maintenance have always been and continue to be disproportionately allocated to women"), the work of caretaking, see Becker, *supra* note 175, at 154 ("caretaking is done by women most of the time in most families"), and the more mundane work required to keep a home functioning, see HOCHSCHILD & MACHUNG, *supra* note 162, at 3 (asserting that working women perform up to one full month a year more work in the home than do men). See also Lewin, *supra* note 162, at A1 (stating that the average woman spends 11 1/2 years taking care of others; the average man spends 6 months).

<sup>314</sup> See David Ellerman, *On the Labor Theory of Property*, 16 PHIL. F. 273, 273, 302–04 (1985).

<sup>315</sup> For an insightful and comprehensive account of how the law has always discounted the familial work that women do, see Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996).

<sup>316</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 338 (Peter Laslett ed., New American Library 1965) (1690).

puts into it. The more one cultivates interconnection and selflessness and intimacy, the more meaningful the relationship will be for both parties. People who expend that labor on behalf of themselves and their children should be rewarded with the value of the relationship. If those who have not traditionally invested in a relationship want to reap its rewards, they must work for it.<sup>317</sup>

Some feminists resist investment theory. Katharine Bartlett wants to construct parenthood “based upon the cycle of gift rather than the cycle of exchange.”<sup>318</sup> Investment theory relies on notions of entitlement that undermine the voluntary gift quality of parenthood.<sup>319</sup> Part of what makes parenting intrinsically valuable, according to Bartlett, is its voluntary nature. But under her system, a court is still left to evaluate who has given more of the gifts. The ultimate question is who has invested more. Comparably, Barbara Woodhouse’s “generism” approach allocates authority based on the “stewardship” that has been “*earned* during gestation and childhood and *exercised* in service to the child’s emerging capacity.”<sup>320</sup> Naomi Cahn’s multiple parenthood approach requires identifying those adults who have *invested* emotionally in the child.<sup>321</sup> The primary caretaker standard<sup>322</sup> and the many best interest tests administered during the initial child custody decision<sup>323</sup> also evaluate and reward the person who has *invested* the most in developing a relationship with the child. Reticent as people are to adopt property rhetoric in the family law context, relying on labor investment theory, the “principal normative theory of property” seems inescapable.

Others may argue that even if one uses a kind of investment theory, financial

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<sup>317</sup> Property law often rewards she who invests over she who simply holds title. A normative desire to reward investment explains everything from the assignment of property rights in news, see *International News Serv. v. Associated Press*, 248 U.S. 215, 241 (1918) (awarding property rights in company that invested in finding the news, not in the company that possessed news), to the doctrines of unjust enrichment, see *Somerville v. Jacobs*, 170 S.E.2d 805, 813 (W. Va. 1969) (holding that investing in another’s land can be rewarded for the value of the investment), and adverse possession, see ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 132 (1997) (explaining that adverse possession allows the productive user to take from the unproductive user).

<sup>318</sup> Bartlett, *supra* note 9, at 295.

<sup>319</sup> See *id.* at 300–31.

<sup>320</sup> Woodhouse, *supra* 9, at 1818–19 (emphasis added).

<sup>321</sup> See Cahn, *supra* note 132, at 44–48 (emphasis added).

<sup>322</sup> For an evaluation of the primary caretaker standard, see Becker, *supra* note 175, at 190–202. The primary caretaker standard awards custody based not on a best interest standard, but on an evaluation of who has been the primary caretaker. See *Garska v. McCoy*, 278 S.E.2d 357, 361 (W. Va. 1981).

<sup>323</sup> See Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1, 16–19 (1984) (explaining that many state court decisions now recognize the importance of the “primary caretaker” even if a primary caretaker standard has not been adopted by the legislature); see also *Pusey v. Pusey*, 728 P.2d 117, 120 (Utah 1986).

investment in a vertical relationship entitles one to some share of that vertical relationship. In the traditional nuclear family, for instance, the father invests a disproportionate amount of money in the child rearing process, while the mother invests a disproportionate amount of time and emotional energy. These parents (and many courts) may think of this labor allocation as a partnership in the enterprise of child rearing, with both parties having invested in the partnership and both parties being entitled to parental relationships at dissolution. However, there are significant problems with the partnership analogy.

As a matter of business partnership law, at dissolution, partnerships are liquidated or put up for auction.<sup>324</sup> Business partners have no right to a distribution in kind.<sup>325</sup> In other words, the law forces the value of the partnership enterprise to be reduced to money, and a court then divides the proceeds. For obvious reasons, investments in children cannot be liquidated. For not so obvious reasons, the law often still treats such investments as divisible. At divorce, the law forces parents to share the investments that they had previously made distinct. Thus, separated parents split the rights to relationship and the financial burdens of child rearing. Yet it is not at all clear that dividing the "partnership" in this manner benefits the child<sup>326</sup> or appropriately compensates the adults.

If the bulk of what one has given to a relationship is money, then money (or some relief from a previously assumed financial obligation) should be adequate compensation at dissolution. In such a case, money is an accurate reflection of the investment one has made. On the other hand, if what one has given to a relationship is primarily emotional investment, it is highly unlikely that money will be an adequate substitute.<sup>327</sup> Moreover, the opportunity costs of one who has financially invested in a vertical relationship are vastly different than the opportunity costs of one whose investment has been non-pecuniary. Men who have been contributing economically have been simultaneously maintaining if not enhancing their opportunities to invest in other things (*e.g.*, better jobs, other businesses, expensive leisure goods or activities). Women who have been investing unpaid emotional energy and time—that is, women who have done the work of intimacy—have done this to the exclusion of other opportunities. Thus, women who have invested significant emotional energy have enhanced the value of the vertical relationship, but their investment is inherently indivisible and non-fungible because the relationship has no value in an external market.

If the divorcing parties choose, as many do, to continue some form of division of labor, with one parent continuing to contribute financially while the other parent

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<sup>324</sup> See UNIF. PARTNERSHIP ACT § 807 (1994).

<sup>325</sup> See *id.* § 402.

<sup>326</sup> See *supra* Part III.B.1.

<sup>327</sup> The greater one's emotional investment in a relationship, the more emotionally valuable that relationship is and the less likely that it can be meaningfully reduced to money.

invests the bulk of the emotional labor, then the parties may agree to give the paying parent some right to a relationship. Absent agreement between the parents, however, there is no reason for the law to assume that financial contribution entitles one to the benefits of a vertical relationship that were explored in Part II.B.

Undoubtedly, this argument suggests that the risks involved with the traditional division of parental labor within families are grave: The financial contributor risks losing the emotional benefits of child rearing, and the emotional caregiver risks losing the financial support that she may expect if the marriage ends.<sup>328</sup> Given the significant number of women who do not want child support<sup>329</sup> and the low percentage of those who actually receive it,<sup>330</sup> and given that even in households that receive child support, the custodial parent's paycheck is the primary source of support for the children,<sup>331</sup> the people incurring the greater increased risk with the proposed model will be men. Women who leave the labor force to take care of children already put themselves at grave financial risk when they become economically dependent on a man who may leave and who is as unlikely as likely to pay child support.<sup>332</sup> In contrast, because courts currently split vertical relationship rights, men are not at risk of losing their potential relationship with their children even if they have spent the bulk of their time investing in their careers and not their relationships with their children. This model would change that by rewarding emotional investment with emotional relationship.<sup>333</sup>

### 3. *Rights and Autonomy*

Other resistance to property rhetoric comes not from its use of investment theory but from its reliance on rights discourse. Katharine Bartlett is concerned that

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<sup>328</sup> As mentioned, *see supra* note 229, a fully developed analysis of paternity and child support doctrine is well beyond the scope of this Article. I will, preliminarily, suggest that a child support regime in which the financial contributor's obligation gradually diminishes over time might be appropriate. A primary caretaker, who has rendered herself economically dependent on her spouse so that she could take care of the children, should not be left with no source of income when the relationship ends. However, if she wishes to break completely free from the defunct horizontal relationship, she must be prepared to leave its financial benefits behind. Thus, the financial contributor's child support obligation should be seen as more of a temporary measure that allows the newly reconstituted family (of mother and child(ren)) to get on its feet.

<sup>329</sup> *See* BELLER & GRAHAM, *supra* note 127, at 20–21.

<sup>330</sup> *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *supra* note 229, at 4.

<sup>331</sup> *See* MACCOBY & MNOOKIN, *supra* note 131, at 271.

<sup>332</sup> *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *supra* note 229, at 4.

<sup>333</sup> Both parties could avoid the increased risk by having couples share more of the financial and emotional responsibilities of parenting. In those cases, the emotional investment in relationship would be comparable and the law would appropriately reward that investment by dividing the relationship.

“parents asserting rights to children tend to emphasize what is due to them rather than what they owe others . . . Rights claims tend to exalt the ‘my’ over the ‘ours’ and the ‘I’ over the ‘we.’”<sup>334</sup> But if, as the empirical and theoretical research strongly indicates, many women already speak in terms of “ours” and “we,”<sup>335</sup> emphasizing the “I” over the “we” may be exactly what women need. The “I” for the woman is likely to already include the child, and, if that child is to thrive, the law may have to be more willing to view the parent-child relationship as a right that the woman has earned. In doing so, the law needs to care less about a defunct horizontal “we.”

Jennifer Nedelsky argues that adjudicating disputes based on a notion of property rights means that “[r]ights [become] things to be protected, not values to be collectively determined.”<sup>336</sup> However, the collective, value-determining decisionmaking that Nedelsky calls for may not work. The best interest of the child standard works badly, if at all. Courts cannot or do not use it, and much scholarship questions whether children benefit from it.<sup>337</sup> In her powerful historical analysis of the development of property as metaphor, Nedelsky writes that “[p]roperty was an effective symbol in part because it was not *merely* a symbol but a concrete means of having control over one’s life, of expressing oneself, and of protecting oneself from the power of others.”<sup>338</sup> It still is. And if women’s needs for autonomy are real, then property rhetoric is a logical place to look for help. Nedelsky suggests that “[i]ndividual autonomy . . . [has been] . . . conceived of as protected by a bounded sphere—defined primarily by property—into which the state [can] not enter.”<sup>339</sup> It is the boundary imagery itself that Nedelsky condemns because, as discussed above, connection, not boundary, enables autonomy.<sup>340</sup> Notions of property focus our attention on that which we call property and away from that which we are excluding.<sup>341</sup> Yet if much of our culture is still grounded in boundaried metaphors and if our formal systems of justice seem to work best when there are bounded and defined rights at issue, then refusing the benefits of these discourses may do women a profound disservice. Women may need and deserve help redirecting their gaze inward.<sup>342</sup> Nedelsky recognizes (and questions) the child development literature

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<sup>334</sup> Bartlett, *supra* note 9, at 298 (“‘Having rights’ [also] means to be entitled to, to be owed, to have earned, or to deserve something in exchange for who one is or what one has done.”).

<sup>335</sup> See *supra* Part III.A.

<sup>336</sup> Nedelsky, *supra* note 71, at 166.

<sup>337</sup> See *supra* text accompanying notes 192–202.

<sup>338</sup> Nedelsky, *supra* note 71, at 165.

<sup>339</sup> Nedelsky, *supra* note 5, at 17.

<sup>340</sup> See *id.* at 12.

<sup>341</sup> See Nedelsky, *supra* note 71, at 177.

<sup>342</sup> Women deserve this help because the collective has benefited from women’s tendency to focus on others. As suggested above, see *supra* text accompanying notes 162–65, it has been

suggesting that understanding what it means to possess something enables a sense of self.<sup>343</sup> The radical feminist literature suggests that women need that sense of self.<sup>344</sup> Our tendencies toward intimacy and connection threaten it. If property rhetoric can strengthen a sense of self, it may well be worth the cost of an imperfect metaphor.

Women trying to protect their own autonomy while maintaining their relationships with their children are in what Margaret Radin might call a double bind,<sup>345</sup> or what Chris Littleton might call a problem of transition.<sup>346</sup> Bounded imagery and traditional liberal constructions of autonomy may not accurately describe women's reality, but denying women the benefits of these tools only serves to further disadvantage them. As analyzed in Part III.A, the less rights-based, more collectivist notions of justice that govern horizontal relationships and intact families (and also infuse most of the cultural feminist critiques of traditional legal doctrine) may stifle women's ability to live separate and apart from potentially destructive relationships.<sup>347</sup> Property paradigms can help construct strong, bounded, and inwardly-focused vertical relationships that can exist on their own, unhindered by interference from the state or private parties. Property paradigms foster a sense of autonomy,<sup>348</sup> and that sense of autonomy, imperfect though it may be, can allow women to break free of intimacies they do not want and grow into lives, voices, and selves of their own.

### *C. The Proposal: A Property Interest that Attaches with Investment*

A parent's right to be free from state interference into her relationship with her child should depend on the amount that parent has invested in the relationship and the extent to which that parent has willingly shared the relationship with others. At birth, this right should be vested solely with the gestational mother.<sup>349</sup> The

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women who have been jumping in after the drowning children.

<sup>343</sup> See Nedelsky, *supra* note 71, at 171–73. In this part of her paper, Nedelsky explores how child-development literature relies heavily on boundary imagery and property.

<sup>344</sup> See *supra* text accompanying notes 152–55.

<sup>345</sup> See Radin, *supra* note 164, at 1699–1704.

<sup>346</sup> See Littleton, *supra* note 152, at 31.

<sup>347</sup> See *supra* text accompanying notes 149–55.

<sup>348</sup> As Nedelsky suggests, one cannot be autonomous without feeling autonomous. See Nedelsky, *supra* note 5, at 24.

<sup>349</sup> With this right should come sole financial responsibility. If a man's genetic connection to a child does not give him relationship rights to the child, it should not give him financial responsibility either. As suggested previously, the proposed framework suggests that it is time to rethink the current paternity system and rely more on a system of assumed commitment (and hence reliance on the part of the primary caretaker and child) for determining child support obligations.



gestational mother has invested more than any other human being in the newborn child. The physical and emotional strains of pregnancy are huge and uniquely female. A biological father gives his sperm. A gestational mother gives: her egg (usually), her liver, her bladder, her iron supply, her pulmonary system, her digestive system, the elasticity of her skin<sup>350</sup> and often her psychological well-being.<sup>351</sup> As a result of her physical investment, the gestational mother has almost always invested more emotionally in the child as well.<sup>352</sup> She feels connected to that child at an emotional level in a way the biological father cannot because she knows her child in a way the biological father cannot. That emotional investment entitles the woman to a greater claim to a relationship with the newborn. As a result, she should have a greater property interest.

As the child grows and other adults invest in relationships with the child, the gestational mother's initial investment becomes relatively less important. Courts must respect the investments of other adults if those other adults have a reasonable expectation that their investment will be protected.<sup>353</sup> The expectation is reasonable as long as the adult has registered his interest. Marriage to the mother is one way of registering one's property interest in a relationship with the child.<sup>354</sup> Adopting the child with the permission of the mother is another. Indeed, for adults who do not believe in the institution of marriage or for whom it is not available as an option, adoption is the best way to record one's interest in the relationship with the child.<sup>355</sup>

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<sup>350</sup> See GERARD N. BURROW & THOMAS F. FERRIS, MEDICAL COMPLICATIONS DURING PREGNANCY 63 (2d ed. 1982); Douglas Haynes, *Course and Conduct of Normal Pregnancy*, in OBSTETRICS AND GYNECOLOGY 299-316 (David Danforth ed., 3d ed. 1977); Edward J. Quilligan & Irwan H. Kaiser, *Maternal Physiology*, in OBSTETRICS AND GYNECOLOGY, *supra*, at 276-80.

<sup>351</sup> See Quilligan & Kaiser, *supra* note 350, at 271-72. I do not mean for this list to be exhaustive. I have yet to show it to a woman who does not want to add numerous other disabling effects.

<sup>352</sup> See LOUIS GENEVIE & EVA MARGOLIES, THE MOTHERHOOD REPORT 95, 100-09 (1987); see also Becker, *supra* note 175, at 142.

<sup>353</sup> Jeremy Bentham wrote that property is a legally protected "expectation . . . of being able to draw such or such an advantage from a thing . . . according to the nature of the case." BENTHAM, *supra* note 1, at 112. Investment, not biological connection, should give rise to expectation, as long as it is clear that someone else does not have a superior interest.

<sup>354</sup> In this way, my proposal incorporates the contributions of the several commentators who have argued that substantial and ongoing relationship with the mother, not blood connection, should determine paternal rights. See Dolgin, *supra* note 76; Shanley, *supra* note 76, at 65; Woodhouse, *supra* note 9, at 1844-51.

<sup>355</sup> In *Titchenal v. Dexter*, 693 A.2d 682, 690 (Vt. 1997), the court refused to give visitation rights to the ex-lover of the child's mother because the ex-lover had not adopted the child. The court declined to adopt an equitable adoption doctrine because it would require too much case-by-case analysis of whether there was a de facto parental relationship. See *id.* at 687-88. The court apparently believed that the more efficient, less litigious and, thus, likely better course for all involved was to structure the law such that clear title to parenthood can be established, should be

To demonstrate how this property system would work, the next three sections apply its principles to the problems of unwed parent adoptions, non-married parents who share a relationship with the child, and custody disputes between previously married parents.

### 1. *Unwed Parent Adoptions*

Courts should protect an unmarried mother's property interest, as they currently do not, by privileging the mother's decision at birth. This means that a mother's desire to keep her pregnancy secret and put the child up for adoption should be respected. The law need not protect the potential claim that the biological father might have in developing a relationship with his child. He has not earned the property interest yet. Thus, putative father registries<sup>356</sup> and adoption statutes requiring that the father who has demonstrated some interest in the yet-to-be-born child be given the right to veto a potential adoption<sup>357</sup> are inappropriate. Consider again the facts of *Augusta County Department of Social Services v. Unnamed Mother*.<sup>358</sup> To require that divorced mother, who carried the child to term while raising four other children, to tell the biological father about the child so that he could develop his own relationship with the child, completely discounts the work that mother did in carrying and bearing the child. It also gives her a remarkable incentive to abort the child. She is free to terminate her pregnancy without telling him. To find, as the law currently does, that her autonomy interest allows her to terminate the pregnancy, but disappears once the child is born, suggests that her physical autonomy is all the law need respect.<sup>359</sup> However, it was the emotional need to be free from connection to both this child and the biological father that this mother needed.

By protecting the potential wishes of the biological father in *Augusta County* or even the expressed wishes of the biological father in *Baby Girl S.*,<sup>360</sup> the law refuses to acknowledge the mother's greater normative claim to control. Whatever

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established, and will only be honored if established. *See id.* at 689 (deferring to the state legislature to determine the classes of persons entitled to parental rights).

<sup>356</sup> *See, e.g.,* *Lehr v. Robertson*, 463 U.S. 248, 263–64 (1983) (finding against the biological father challenging an adoption, in part, because the father failed to register with the putative father registry).

<sup>357</sup> For a discussion of the various statutes, see Forman, *supra* note 76, at 1007–08.

<sup>358</sup> 348 S.E.2d 26 (Va. Ct. App. 1986); *see also supra* notes 230–36 and accompanying text.

<sup>359</sup> I am not arguing that the state should privilege abortion over birth. I am only pointing out that contrary to what the states have argued in numerous abortion decisions before the Supreme Court, in the unwed parent context, the law does privilege abortion over adoption.

<sup>360</sup> *See In re the Adoption of Baby Girl S.*, 535 N.Y.S.2d 676, 678 (1988) (granting parental rights to the biological father where the mother did not want to marry the biological father and did not want him involved with her pregnancy).

the biological father's desire to invest, the mother invested first and to a greater degree. The father has done and can do nothing to make his claim to a relationship any weightier at birth than it is prior to birth when the mother still has the right to abort. If the law need not respect his desire for connection pre-birth, the law need not respect his desire post-birth either. He has done nothing to earn it. Mothers of newborns have the right to exclude.<sup>361</sup>

The mother's decision to relinquish her right to a relationship by placing the child up for adoption does not diminish her right to exclude. She is not abandoning her property interest. She is giving her right to relationship to someone else, someone who is intentionally not the father. Indeed, the problem in these situations is that once the biological father is involved, the mother may be unable to free herself from relationship to the child or its father. That freedom from relationship is what she wants and what she can only secure by placing the child with adoptive parents. By electing not to inform the biological father, she is exercising the kind of authority commonly exerted over property interests; she is controlling its dispensation.<sup>362</sup> She has earned the right to that control through the work she has done in pregnancy.

A system that vests the gestational mother with complete decisionmaking authority based on her disproportionate physical and emotional investment in the child significantly simplifies the current adoption rules and diminishes the potential for damaging adoption contests. Consider two of the most widely publicized recent adoption cases, *In re Baby Girl Clausen*<sup>363</sup> and *In re Kirchner*,<sup>364</sup> better known as

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<sup>361</sup> The right to exclude is generally considered one of the "bundle of rights" that helps define what property is. See JOSEPH WILLIAM SINGER, PROPERTY LAW 4 (2d ed. 1997); MUNZER, *supra* note 303, at 22-23.

<sup>362</sup> The right to transfer property is also considered one of the "bundle of rights" that help define property. See SINGER, *supra* note 361, at 4.

<sup>363</sup> 502 N.W.2d 649 (Mich. 1993). Clara Clausen gave birth to a baby daughter in Iowa, listing Scott Seefeldt as the father on the birth certificate but knowing that Seefeldt was not the father. See *id.* at 652. Seefeldt signed the release of custody form. See *id.* A married couple from Michigan, the DeBoers, filed a petition to adopt the child. See *id.* Approximately one month after the birth, Clausen filed a motion to revoke her release of custody and filed an affidavit revealing that she had originally lied about Seefeldt being the father. See *id.* She averred that Dan Schmidt was the real father. See *id.* Schmidt then filed an affidavit of paternity and contested the adoption. See *id.* Two and half years and five courts (including two separate Supreme Courts decisions) later Dan Schmidt, who had by this time married Clara Clausen, was awarded custody of the child. See *id.* at 668.

<sup>364</sup> 649 N.E.2d 324 (Ill. 1995). In January, 1991, Daniella Janikova thought that her boyfriend, Otokar Kirchner, had abandoned her and married another woman. See *id.* at 326. She was pregnant and made plans to put the child up for adoption. See *id.* When Otokar returned unmarried, she refused his contact and continued with her plans to give the child up. See *id.* at 327. After the child was born, she told Kirchner that the baby had died. See *id.* Kirchner did not believe her and three months after the child was born, sought to intervene in the adoption proceeding. See

"Baby Jessica" and "Baby Richard." In both cases, the biological, gestational mothers put the children up for adoption, relinquishing their rights to them. Subsequently, after finding out about the adoptions, both biological fathers claimed that they had not properly given their consents to the adoptions. Both cases were in litigation for years, and both cases were eventually resolved in favor of the biological father, leaving the children (ages two and four, respectively) to be taken from the only homes they had ever known in order to protect the rights of their biological fathers. If the law cared less about protecting abstract notions of biological fatherhood and more about honoring the physical and emotional investment that creates relationships, these very sad cases would never have been before the court.<sup>365</sup> The gestational mothers, who had earned the right to decide, would have had final decisionmaking authority.<sup>366</sup>

## 2. Shared Relationships

For women who do not put their children up for adoption, a court's analysis is potentially more complicated. In many instances, women agree to share their vertical relationships. By sharing them, mothers dissipate the relative strength of their own property interests by affording other people the opportunity to invest. A woman cannot sit by and let someone else invest in her child without being prepared to relinquish some of her rights. Estoppel doctrine provides the appropriate property law analogy. Although, in the ordinary course, a license to use another's land is revocable at any time by the landowner, a landowner cannot stand by and acquiesce in the licensee's development of the land unless the landowner makes clear that the licensee's investment is at the licensee's own risk.<sup>367</sup> Comparably, if a mother does

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*id.* That proceeding took four years to adjudicate. *See id.* at 328. In May of 1995, the Illinois Supreme Court finally invalidated the adoption, and the four year old boy was given to Kirchner who had since married Janikova. *See id.* at 340.

<sup>365</sup> I am not arguing that either of these cases were wrongly decided under the law. Indeed, I think they were both correctly decided under current law because, unlike the adoptive parents in both cases, I do not think that the best interest of the child standard should govern in all adoption proceedings. However, I would change the current statutes so that instead of protecting the (unearned) rights of biological fathers or the (indeterminable) best interests of children, courts should honor the mothers' decisions. The court should take seriously the mother's relinquishment of her rights and not be concerned with the biological father's interest in a relationship he has never known. Neither the Iowa court nor Illinois court was free to do that under existing law.

<sup>366</sup> As indicated, *supra* notes 363–64, the biological fathers in both of these cases have since reconciled with the biological mothers. The effect of this was to render the biological mothers' relinquishment of consent almost meaningless. Both biological mothers are currently raising the children.

<sup>367</sup> *See, e.g.,* Camp v. Milam, 277 So.2d 95, 100 (Ala. 1973); Holbrook v. Taylor, 532 S.W.2d 763, 766 (Ky. 1976); Vrazel v. Skraganek, 725 S.W.2d 709, 712 (Tex. 1987).

not make clear that she intends to maintain exclusive rights to the vertical relationship with her child, she risks losing some of it to someone whom she lets invest.

Some courts already rule in this manner. For instance, the result in *Michael H.*<sup>368</sup> can be explained by viewing the vertical relationship with the child, Victoria, as a property interest vested primarily in Carole, the mother and primary caretaker. Carole allowed Michael—the biological father who was not Carole's husband—to develop a relationship with Victoria.<sup>369</sup> However, the facts suggest that Michael knew he was investing to his own detriment. Carole's marriage to another man<sup>370</sup> put Michael on notice that his investment was not going to be protected legally. Mere investment in someone else's property does not give the investor a property interest. If Marshall builds on Taney's land,<sup>371</sup> but it is clear to Marshall that the land is owned by Taney, the law does not protect Marshall's investment unless Taney did something to make Marshall's reliance on his investment reasonable. If Taney leads Marshall to believe that Marshall's reliance is reasonable, Taney is estopped from excluding Marshall. Comparably, if Carole had acted in such a way as to allow Michael to believe that his investment would be legally protected, he could have asserted a claim on an estoppel theory. If he had invested in his relationship with Victoria in reasonable reliance that he would have a legally enforceable claim to reap the benefits of his investment, his investment should be protected.

Similar reasoning underlies court decisions in the growing number of equitable parent cases. Courts award parental rights to non-legal parents when the legal parent has misled the non-parent in some way. Thus, the critical fact in *In re Roberts* was that the biological mother misled her husband into believing that he was the biological father.<sup>372</sup> The husband testified that he had invested in the vertical relationship thinking that his investment would be protected because the mother told him he was the father.<sup>373</sup> On the other hand, the Court in *D.G. v. D.M.K.*<sup>374</sup> refused to adopt the equitable parent doctrine precisely because there had not been any "detrimental reliance" on the part of the parent asserting the equitable parental

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<sup>368</sup> 491 U.S. 110 (1989).

<sup>369</sup> See *id.* at 113–14.

<sup>370</sup> See *id.* Carol clearly did not lead Michael to believe that his investment would be protected because she failed to file the requisite motion for bloodtests that could have rebutted the statutory presumption that Gerald was Victoria's father. See *id.* at 115.

<sup>371</sup> Marshall and Taney are, of course, Calabresi and Malamed's characters. See Calabresi & Malamed, *supra* note 1, at 1071. They are equally useful in this example, however.

<sup>372</sup> See *In re Roberts*, 649 N.E.2d 1344, 1346 (Ill. 1995).

<sup>373</sup> See *id.*

<sup>374</sup> 557 N.W.2d 235 (S.D. 1996).

claim.<sup>375</sup> Therefore, as one should with any investment, before investing a potential investor should make sure that no one else besides the mother has better title. Marriage and adoption are means of registering one's property interest and quieting title to a relationship with a child.

For cases in which more than one parent has recorded his or her interest in a relationship, through marriage or adoption, courts must evaluate the relative investment of the parties. If there has been equal or close to equal investment in the relationship with the children, then courts must muddle through the process of dividing property between joint owners. This process will be difficult, but no more difficult than what courts currently do when making custody decisions under a primary caretaker or a best interest of the child standard. Indeed, the proposed framework asks courts to do even less of this difficult evaluation. Unlike the current regime in which courts continually evaluate what is in the child's best interest (when asked to by a parent asserting positive parental rights), under the proposed model, once the court has evaluated the relative investment of the parties for initial custody purposes, it should defer to the negative parental rights of the parent awarded custody. If, at the initial stage, the court finds that the parental investments are truly comparable, then joint custody may be appropriate. However, in situations in which there have really been comparable investments in relationship with the children, it is likely that the parents will want to continue to share their vertical relationship rights with each other.<sup>376</sup> Few parents who really love their children will want to deprive their children of positive, enriching vertical relationships.<sup>377</sup> Many adults choose some form of shared custody arrangement,<sup>378</sup> but joint custody works, when it works, not because courts order it but because parents want it to work for the sake

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<sup>375</sup> See *id.* at 242.

<sup>376</sup> Maccoby and Mnookin found that mothers resisted fathers' custody claims when they felt that the father had not been substantially involved with the child rearing process before divorce. When fathers had been involved, women accommodated more shared parenting agreements after divorce. See MACCOBY & MNOOKIN, *supra* note 131, at 272.

<sup>377</sup> A custodial parent who earns less money than the non-custodial parent also has a financial incentive to keep the non-custodial parent involved. The more custodial parents try to separate from their ex-spouses, the less valid are their claims to child support. Nonetheless, one's right to separate from a former spouse, if one chooses, should not be diminished simply because one's spouse has a history of supporting the children financially. See *generally supra* text accompanying notes 323–27.

<sup>378</sup> See CJI WARE, SHARING PARENTING AFTER DIVORCE 16 (1982); Constance R. Ahrons, *The Coparental Divorce: Preliminary Research Findings and Policy Implications*, in JOINT CUSTODY: A HANDBOOK FOR JUDGES, LAWYERS AND COUNSELORS C1, C7 (Ass'n of Family Conciliation Courts ed., 1979); Robert H. Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements Are Parents Negotiating*, in DIVORCE REFORM AT THE CROSSROADS, *supra* note 73, at 37, 54–55; Susan Steinman, *The Experience of Children in a Joint-Custody Arrangement*, 51 AM. J. ORTHOPSYCHIATRY 403, 406–07 (1981).

of their children.<sup>379</sup>

### 3. Custody Modification

Custody and visitation agreements, even if amicably negotiated and complied with at first, are often subject to modification. They have to be; custodial parents' lives are not static. As illustrated above, however, courts often discount women's needs to redirect the course of their lives. Sometimes courts do this by focusing solely on the child's interests and ignoring how the child will benefit from the custodial mother's own financial or emotional growth, and sometimes courts do this by privileging a status quo that does not permit custodial mothers room for growth. A conceptual shift towards property could influence the kinds of tests courts use to adjudicate these modifications, diminish judicial tendencies to ignore women's needs, and encourage courts to honor the custodial parent's customary desire to exercise dominion over that which is hers.

For instance, property paradigms will encourage a court to presume that a custodial parent acts in the child's best interest.<sup>380</sup> This is the constitutional presumption that married parents enjoy, and it is in accord with the assumption that property owners generally act in a way that best protects their property.<sup>381</sup> Hence, in relocation cases, courts should place the burden on the non-custodial spouse to prove that a change in custodial arrangement is not in the child's best interest. That burden will be met only if the non-custodial parent overcomes the pre-existing presumption in favor of the move.<sup>382</sup> Courts should recognize the substantial

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<sup>379</sup> Many divorced couples are satisfied with their joint custody agreements, but most of the studies involve voluntary joint custody arrangements. See Chambers, *supra* note 194, at 551 n.284, 552. We also know very little about the joint custody arrangements that fall apart. See *id.* at 558. There is little evidence suggesting that joint custody is beneficial for children. See Jana Singer & William Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 505-11 (1988). Some research suggests that it is actually detrimental to children. See Rosemary McKinnon & Judith Wallerstein, *Joint Custody and the Preschool Child*, 4 BEHAV. SCI. & L. 169, 176-82 (1986). As discussed earlier, see *supra* text accompanying notes 203-06, relationships that increase tension in the child's household(s) do more harm than good.

<sup>380</sup> Some courts are beginning to do this. In *Wolinski v. Browneller*, the custodial parent argued that the court was required to presume that her proposed grandparent visitation was in the child's best interest. See *Wolinski v. Browneller*, 693 A.2d 30, 35 (Md. Ct. Spec. App. 1997). The court agreed. See *id.* at 45.

<sup>381</sup> To a certain extent, the problem of too many potential parental interests and too few defined rights can be seen as a tragedy of the commons problem. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968) (stating that no individual will take adequate care of a resource if everyone has a claim to that resource).

<sup>382</sup> Courts struggle with the burden of proof problem. In *Ramirez-Barker v. Barker*, the court put the burden of proof on the non-custodial parent to show that the move would have some negative impact on the child, but then said that once that was shown, neither parent had the burden

overlap between the needs of custodial parents and their children and not fall victim to the tempting tendency to assume that a child will be better off maintaining a relationship with a non-custodial parent. In an ideal world, all children could maintain relationships with all parents, but the world of divorce is never ideal. A child benefits when a custodial parent takes care of herself emotionally and financially.<sup>383</sup> If a substantial relationship exists between the non-custodial parent and the child, non-custodial parents can rebut the presumption in favor of the move. If, the relationship is of the more typical infrequent visitation type, however, courts should be less willing to protect the potential for a relationship that has yet to materialize.

Courts should also cease assuming that, by taking care of her own needs, the custodial spouse is somehow not taking care of her children's needs. In any given instance, a custodial parent may not give adequate consideration to her children's interests, but courts should not assume that just because parents are divorced they manipulate their children or subordinate their children's interests.<sup>384</sup> A married parent is not forced to sacrifice her own emotional well-being for the sake of her children; why do courts assume that a non-married parent must make that sacrifice? A custodial parent's decision to date a new person or to put herself through school may cause some short-term difficulties for the child, but no investment is painless, and the interdependency that marks relationship<sup>385</sup> means that productive investment by one person will benefit those with whom she is in relationship. By helping herself, the custodial parent is helping her child, and the non-custodial parent has no right to tell her how to manage her property.

Thus, non-custodial parents can be viewed as people with both a type of contingent remainder and executory interest.<sup>386</sup> If something happens to the custodial parent, the vertical relationship with the child becomes primarily the non-custodial parent's interest. In this sense, they are remaindermen. Comparably, if the custodial parent violates a condition of parenthood, then the non-custodial parent

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of establishing what was in the best interest of the child. *See Ramirez-Barker v. Barker*, 418 S.E.2d 675, 679 (N.C. Ct. App. 1991). Other courts have placed the burden squarely on the non-custodial parent to show that the move would not be in the child's interest, *see Auge v. Auge*, 334 N.W.2d 393, 395 (Minn. 1983), while still others have placed the burden of proving the child's best interest on the moving spouse, *see Seesel v. Seesel*, 748 S.W.2d 422, 424 (Tenn. 1988).

<sup>383</sup> *See Johnston*, *supra* note 134, at 174 ("Findings indicate that the custodial parent's own adjustment is the best predictor of child adjustment.").

<sup>384</sup> As Martha Fineman has noted, "if it were true that a large number of parents can comfortably be presumed to have the tendency to sacrifice their children's well-being [at divorce], isn't the real conclusion we should reach be that there are many people who are unfit parents . . . ?" Fineman, *supra* note 197, at 852.

<sup>385</sup> *See supra* text accompanying notes 37–40, 50–51.

<sup>386</sup> If there is some form of joint custody or visitation schedule, they also have some present interest.



has a kind of executory interest. But the conditions of parenthood should not be any different for the custodial parent just because she does not have a spouse. The executory interest should not vest unless the custodial parent seriously compromises the future interest of the non-custodial parent. It must not vest simply because the non-custodial spouse or a court might make a parenting decision differently. Future interest holders cannot dictate the conditions under which the present interest stays vested.

If courts come to understand the vertical relationship between parent and child in the context of bounded property rhetoric, they will be more likely to reward women for the investment that women usually make in their children. They will be less afraid of vesting women with greater control over parenting decisions, and they will be more likely to recognize that women have compelling needs to move on with their lives and to take their property with them when they go. Such a shift would encourage courts to see that just as men have needs for connection and interdependence that the law respects when families are intact, women have needs for autonomy and independence that the law should respect when families are not intact.

#### *D. Property Theory and Horizontal Relationships*

What does all of this property talk mean for horizontal relationships? Quite possibly nothing at all. The law already treats marriages as boundaried relationships into which it should tread lightly. If the arguments for this deference are persuasive, then the deference should continue and doctrines based upon it, like family privacy, spousal immunity, spousal privilege, and family autonomy should remain intact.<sup>387</sup> On the other hand, if one is persuaded that legal deference to horizontal relationship does more harm than good, then perhaps, as other feminists have argued, marriage should cease to exist as a legal category.<sup>388</sup> If one believes that the law's protection of marriage brings with it both benefits and burdens, then arguably we should proceed as we currently are, respecting boundaries when horizontal relationships are clearly intact, but being careful to make sure that the exit signs are clearly marked for those who want or need to leave the relationship.<sup>389</sup>

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<sup>387</sup> For a brief discussion of these doctrines, see *supra* notes 11, 12, 64.

<sup>388</sup> This is the position taken by Fineman. See FINEMAN, *supra* note 29, at 8; cf. Polikoff, *supra* note 30, at 1536.

<sup>389</sup> The creeping erosion of both spousal immunity and spousal privilege doctrine show how the law is less respectful of boundaries than it used to be, but still careful to protect them at times. Some states have eliminated the spousal immunity doctrine completely. See CLARK, *supra* note 64, at 633, 635. Others have eliminated it only for intentional torts. See *id.* If one believes that legal recognition of marriage serves important goals, then this partial respect for the immunity makes sense. An intentional act by one spouse against another does enough damage to the relationship

The property analysis does suggest that women should be careful before entering into marriage. As analyzed, marriage may stifle potentially important desires for autonomy and independence, and it necessarily erodes the otherwise sole right women would have to their children. It is important for women to keep these concerns in mind. However, it is unlikely that women will start either fleeing their marriages or running to sperm banks. Most women value horizontal relationships just as much as, if not more than, men do because women place more value on and root more of their identity in relationships.<sup>390</sup> Making women more aware that they can leave a relationship will not necessarily lead them to do so. Moreover, because healthy horizontal relationships are interdependent, wives may benefit from the extent to which legal protection of marriage encourages their husbands to become more caring, intimate, and selfless.

Also, one need not worry (if "worry" is the appropriate term) about women parenting children without men so that the women can enjoy exclusive parental rights. As I have analyzed elsewhere, although most women invest more in vertical relationships than do men, what most single parents want is not exclusive parental rights, but an opportunity to share the expressive, enriching, and exhausting experiences of parenthood with someone else.<sup>391</sup> Most women currently choosing to have children without a partner are doing so not because they want exclusive control, but because they cannot find someone with whom they can share their control.<sup>392</sup> Vertical relationships, in part because they involve so much work and

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to make legal protection of the res unjustifiable. Negligent infliction of harm, on the other hand, likely does less damage to the relationship, thus leaving the res viable and worthy of protection. The subordination of individual rights implicit in respecting the res in this manner would only seem appropriate, however, if divorce were readily available. If one party is willing to sacrifice the res (by getting divorced) in order to sue, the res need not be protected.

Comparably, courts have severely limited the adverse spousal testimony privilege in recent years, but the spousal communication privilege has come under relatively little attack. *See id.* at 638. Milton Regan defends both the testimony privilege and the communications privilege as important symbolic statements about the law's respect for the unity created by marriage. *See Regan, Spousal Privilege, supra* note 37, at 2156. The existence of these privileges encourages individuals within marriage to think of themselves not only as individuals apart from their marriages, but as individuals whose identities cannot be defined outside of their intimate connections. *See id.* at 2049. If legal recognition of marriage encourages interconnection and intimacy, then there are sound reasons for keeping both the testimonial and communication privilege alive.

<sup>390</sup> Parts II and III suggest that what makes women different from men is the extent to which they invest in and value these relationships without the law's help.

<sup>391</sup> *See* Katharine K. Baker, *Taking Care of Our Daughters*, 18 CARDOZO L. REV. 1495, 1519 (1997) (reviewing FINEMAN, *supra* note 29) (stating that most of the single mothers of today, although they are mothers by choice, are not single by choice).

<sup>392</sup> *See* SHEILA B. KAMERMAN & ALFRED J. KAHN, *MOTHERS ALONE* 136-37 (1988) (discussing the growing class of single, educated, economically secure women who choose to have

so much joy, are a form of property that most people yearn to share.

The property analysis also provides little assistance to the conundrum of spousal maintenance. As defined throughout this Article, the res created by legal recognition of family is the relationship itself. Investment in that relationship gives one a stronger claim to the res. At divorce, the relationship is dissolved. The res is gone. Although there may be many reasons and theories pursuant to which we should award spousal maintenance,<sup>393</sup> an earned interest in the horizontal relationship is not one of them because at divorce the res is worth nothing. The relationship is null and void.

What property analysis suggests for horizontal relationships, therefore, is that women should be aware of the doors that close when one enters into a boundaried union. Many women may be comfortable with these closed doors because they are comfortable with the interdependence and selflessness that governs the world of boundaried relationship, and they would rather sacrifice their own autonomy for the sake of the collectivist goals of family. What is most important is that women understand how the boundary operates so that their decision to cross it is an informed and meaningful one.

## V. CONCLUSION

Much feminist scholarship calls for tearing down familial veils of privacy<sup>394</sup> and expunging property rhetoric. I have argued, instead, that the freedom from the state that veils of privacy can provide and the clarity that property rhetoric affords serve important and deserving values. The problem lies not in the existence of privacy veils and property rhetoric, but instead on when the law has afforded their shelter and privilege.

To the extent that horizontal relationships foster interdependence, selflessness, and forgiveness, they should be honored as entities worthy of the state's deference and respect. Healthy horizontal relationships make us happy. However, we must also be mindful of marriage's potential dangers. Interdependence rooted in an exchange of intimacy for financial support may feel much more like vulnerability than transcendence for many women. The kind of sacrifice and connection

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children on their own, but who readily admit that they would rather be parenting with someone else).

<sup>393</sup> Among these reasons and theories are: the importance of encouraging investment in horizontal relationship and intimacy, the need to compensate for reasonable expectation of shared wealth, and the desire to address unjust enrichments. *See generally* Ellman, *supra* note 182 (stating theories that justify alimony).

<sup>394</sup> *See* CATHARINE A. MACKINNON, *Privacy and Equality: Beyond Roe v. Wade*, in *FEMINISM UNMODIFIED*, *supra* note 142, at 93, 97; Elizabeth Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 974-75 (1991).

necessary to keep families together does not come without cost. To the extent that women invest disproportionately in these values, their work must be honored.

One way to value this intimacy, in the vertical relationship context, is to award parental rights based on the extent to which parents invest in intimacy. At present, the law respects, by way of awarding negative parental rights, only those vertical relationships that are supported by a horizontal relationship between legal parents. The law does not evaluate whether a parent has demonstrated the kind of selflessness, forgiveness, and nurturance necessary for real relationship. The failure of courts to evaluate the substantive connection between parent and child and the courts' willingness to assume connection when none is demonstrated results in a devaluation of the intimacy work that women do. It also demonstrates that courts protect men's potential desires for connection at the expense of women's desires for autonomy.

Understanding the right to a vertical relationship with a child as a property right celebrates the importance of intimate relationships while insulating primary caretakers from both state and private party attacks on their child rearing. By casting the vertical relationship right as a property right for which one must labor, the law may finally come to respect that men should enjoy parental rights only if they have done the work of intimacy, lived the life of interdependence, and experienced the kind of selflessness that justify legal privilege of relationship. Vertical privacy protection will force men to work for a place behind the veil by requiring that they work for that which the law has always assumed to be theirs, namely, relationships with their children.

