

# PRINCIPLES OF U.S. FAMILY LAW

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## TABLE OF CONTENTS

INTRODUCTION .....	1
I. A TYPOLOGY OF U.S. FAMILY LAW: ITS CONCEPTS AND THE RULES THAT EMBODY THEM .....	4
A. <i>THE METHODOLOGY</i> .....	4
B. <i>EMBODYING CONJUGALITY AND CONTRACT: RULES OF MARRIAGE AND DIVORCE</i> .....	7
1. <i>Marriage and the Marital Family</i> .....	7
2. <i>Divorce</i> .....	10
C. <i>EMBODYING CONJUGALITY, PRIVACY, AND PARENS PATRIAE: RULES OF PARENTING AND CHILD WELFARE</i> .....	12
D. <i>EMBODYING ALL OF THE ABOVE: RULES THAT DEPEND ON FAMILY STATUS</i> .....	14
II. PRINCIPLES OF FAMILY LAW .....	15
A. <i>BIBLICAL NATURALISM AND ITS INFLUENCE ON U.S. FAMILY LAW</i> .....	16
1. <i>The Jewish Tradition</i> .....	17
2. <i>The Christian Tradition</i> .....	19
3. <i>The Natural Law Tradition</i> .....	21
4. <i>Its Influence on U.S. Family Law</i> .....	22
B. <i>LIBERAL INDIVIDUALISM AND ITS INFLUENCE ON U.S. FAMILY LAW</i> .....	27
1. <i>Liberal Individualism</i> .....	27
2. <i>Its Influence on U.S. Family Law</i> .....	31
III. EVALUATING THE PRINCIPLES .....	37

PRINCIPLES OF U.S. FAMILY LAW

A. *THE PRINCIPLES, INDIVIDUALLY* ..... .39

B. *THE PRINCIPLES, WORKING TOGETHER* ..... .43

CONCLUSION. .... .45

# PRINCIPLES OF U.S. FAMILY LAW

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*What explains U.S. family law? To answer this question, this Article undertakes a conceptual analysis of the legal practices that govern families. This analysis has yet to be done, and its absence hampers constructive thought on our family law. The Article develops a typology that conceptualizes U.S. family law and exposes its underlying principles: First, it identifies the significant elements, or rules of family law. Second, it demonstrates that these rules reflect or embody four important concepts – conjugality, privacy (familial as well as individual), contract, and parens patriae. Finally, it shows that the concepts of family law in turn embody two distinct underlying principles – Biblical naturalism and liberal individualism. From these powerful principles, we can derive modern U.S. family law: they explain what our family law is.*

*With this deepened understanding of its structure, the Article next evaluates family law as the expression of its principles. It concludes that each principle is individually flawed; and, taken together, they are too often in unproductive tension. They thus doom U.S. family law to incoherence and must be revised.*

*At a minimum, this Article seeks to launch a much-needed debate in family law on whether our current foundational principles are desirable, or even defensible. More ambitiously, the Article aims to ground a new jurisprudence of family law that better reflects the social goals and needs of contemporary U.S. society.*

## INTRODUCTION

U.S. family law is chaotic. Federal, state, and administrative bodies enact and apply constitutional, statutory, and judge-made laws. Together these laws regulate families and family life, but it is a struggle to find thematic connection between one doctrine and the next. The chaos that results is apparent not just to those who practice law or ponder it in the academy, but to any layperson who reads the newspaper. Marriage promotion programs coexist with statutory schemes that promise speedy and painless divorces;<sup>1</sup> same-sex couples and their families receive public

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<sup>1</sup> See *infra* notes 19, 35-36, and 61, and accompanying text.

## PRINCIPLES OF U.S. FAMILY LAW

benefits and protections in many cases, while the Defense of Marriage Act, state constitutional amendments, and the proposed Federal Marriage Amendment all seek to withdraw or, at the least, keep them to a minimum;<sup>2</sup> and parents' rights (especially those of married parents) can receive greater consideration than the best interests of their children.<sup>3</sup> The list goes on.

But *is* there a deeper coherence that unifies diverse family laws? And if so, what is it?

The Article examines those questions and reaches two conclusions: First, there is an imperfect coherence to family law as it now exists, as two principles – Biblical naturalism and liberal individualism – link together and explain its central concepts. Second, each principle is individually flawed; and, taken together, they are too often in unproductive tension. They thus doom U.S. family law to incoherence.

Biblical naturalism embraces a pre-modern notion of natural law molded by Biblical scripture and Judeo-Christian doctrine.<sup>4</sup> It dictates a normative view of the “moral family”. Liberal individualism emphasizes the atomistic individual and safeguards freedom in a secular and pluralistic society. And from these powerful principles, we can derive modern U.S. family law: they explain what our family law is.

This Article launches the development of a new normative jurisprudence of the laws regulating families. The necessary first step of this larger project is a conceptual analysis of the legal practices that govern families. The analysis resides at the intersection of positive and normative analysis, and it seeks to lay bare the ideological assumptions embodied in our institutional practices. To do this, the Article applies a pragmatic methodology that eschews top-down deductive analysis, which would proffer philosophical principles that *ought* to serve as foundation of and justification for a legal system or institutional structure. Analysis instead begins closer to the metaphorical middle, identifying those principles that currently *do* serve as foundation of and justification for our actual family law system.<sup>5</sup>

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<sup>2</sup> See *infra* note 129, and accompanying text.

<sup>3</sup> See *infra* notes 53-55, and accompanying text.

<sup>4</sup> See *infra* notes 69, and accompanying text. “Biblical naturalism” is a term adopted for the sake of convenience, economy, and clarity. It should be noted that it is unrelated to the works of Brian Leiter, who imports the term “naturalism” into legal theory to refer to the general belief that philosophical inquiry should refer to and depend upon empirical study. See, e.g., Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997).

<sup>5</sup> H.L.A. Hart employed this process of criticism in books that explored various jurisprudential issues. See *generally*, H.L.A. HART, *THE CONCEPT OF LAW* (adjudication); H.L.A. HART AND A.M. HONORE, *CAUSATION IN THE LAW* (fault); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* (criminal law). The methodology was refined by legal philosopher Jules Coleman. See JULES

## PRINCIPLES OF U.S. FAMILY LAW

Identifying family law's foundational principles is critical. It exposes the underlying structure of family law and "deepens our understanding of its structure by displaying the coherence and mutual support of its component elements."<sup>6</sup> And it is only once the structure is clear that we can begin to evaluate family law, including its underlying principles, intelligently.<sup>7</sup> This conceptual analysis of family law has yet to be done, and its absence hamstrings constructive thought on our family law.

The typology developed here to conceptualize U.S. family law and expose its principles is new: First, it identifies the significant elements, or practices, of family law.<sup>8</sup> Next, it examines those elements to reveal the concepts they embody. It then examines the concepts and concludes that, along with its practices, they in turn embody the twin principles of Biblical naturalism and liberal individualism. Family law's practices and concepts thus effectuate and concretely express its principles.<sup>9</sup>

Scads of laws touch families in some way. Part I begins with a brief discussion of the *corpus juris* of family law. It comprises those rules that intentionally or directly (as opposed to incidentally) affect family relationships. This Part then argues that these rules reflect or embody four important concepts: conjugality (of the heterosexual sort), privacy (familial as well as individual), contract, and *parens patriae*.<sup>10</sup>

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COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY xiv, 5-6 (2001). This Article looks primarily to Coleman's refinement for methodological guidance.

<sup>6</sup> COLEMAN, *supra* note 5, at 23.

<sup>7</sup> Coleman argues for uncovering a legal system's actual foundational principles:

[This places us] in a position to ask . . . how attractive the principles themselves are. The key point is that *the moral or justificatory questions are not prior to the explanatory ones*, but can grow out of the explanatory project as it reveals the abstract principles in greater specificity and concreteness.

COLEMAN, *supra* note 5, at 6.

<sup>8</sup> There is no effort, however, to exhaustively chronicle U.S. family law. A number of academics have ably and comprehensively described modern family law, and to do so here would not advance this project. *See, e.g.*, SANFORD N. KATZ, FAMILY LAW IN AMERICA (2003); HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES (2d. ed. 1988). Instead, this Article outlines family law's most salient features — those that give it its shape — thereby rendering it susceptible to analysis.

<sup>9</sup> COLEMAN, *supra* note 5, at 6.

<sup>10</sup> Literally, "father of the country". *Parens patriae* power is the state's power to act to protect from harm or promote the welfare of individuals who lack the capacity to act in their own best interests. *See, e.g., Developments in the Law – The Constitution and the Family* (pt. 3), 93 HARV. L. REV. 1198, 1199 (1980). For a discussion of its development as a doctrine, *see* Natalie Loder Clark, *Parens Patriae: History and Present Status of State Intervention into the Parent-Child Relationship*, in 1A CURRENT PERSPECTIVES IN PSYCHOLOGICAL, LEGAL

## PRINCIPLES OF U.S. FAMILY LAW

Part II argues that the concepts of family law in turn embody two distinct underlying principles — Biblical naturalism and liberal individualism. It describes each and traces, both historically and thematically, how they have shaped our family law. It identifies and further describes the concepts that figure in each principle and explains their interrelationships.

Part III concludes that liberal individualism and Biblical naturalism each have their flaws, and together they are irreconcilable. The continued accommodation of both in law leads to incoherence and thwarts the achievement of important goals. As each pulls family law in a different direction, lawmakers and members of an increasingly-divided populace may cling to one or the other principle, warts and all — but not both. If family laws are to generate outcomes that achieve some level of purposive coherence — or at a minimum that do not undercut family law’s more important goals — the continued incorporation of both principles must be consciously and explicitly abandoned. In their place we must substitute either a single unifying principle or an internally consistent set of principles. Identifying the current principles of U.S. family law and understanding their individual and in-tandem shortcomings will advance that important project.

### **I. A TYPOLOGY OF U.S. FAMILY LAW: ITS CONCEPTS AND THE RULES THAT EMBODY THEM**

#### *A. THE METHODOLOGY*

This Part examines the primary elements or rules of U.S. family law and argues that together they reflect its key concepts: conjugality, privacy, contract, and *parens patriae*. To come at it another way, each of these concepts warrants and is actualized by a range of inferences, and — if the list of concepts is correct and complete — this range of inferences corresponds with the important elements of our family law. For example, one can infer from the concept of conjugality many of the key practical elements of our marriage laws—a formalized relationship between an opposite-sex couple that is presumptively enduring and through which sex and procreation are legitimated. In this way, the rule or practice both reveals the content of the concept and can be inferred from it.<sup>11</sup>

Part II will argue that these concepts taken together in turn reflect general principles — Biblical naturalism and liberal individualism. These

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AND ETHICAL ISSUES 109, 109-10 (Sandra Anderson Garcia & Robert Batey eds., 1991).

<sup>11</sup> See COLEMAN, *supra* note 5, at 7-10. The rules of family law provide neither the concepts themselves nor the principles they embody with *all* of their content. Other legal systems and a full range of social practices contribute to and can be embodied in them as well. But the rules of family law certainly give the concepts and principles some, if not much, of their content. See *id.* at 56-57.

principles are embodied in the concepts and rules of U.S. family law and simultaneously explain it – not its every aspect, but its core.<sup>12</sup>

Two notes on the structure of the rules/concepts/principles construct are called for. First, the reader should note that the boundaries between each category are not rigid; the categories are interconnected and must be viewed holistically. Precise demarcation is not always possible. Nor is it necessary – the goal of such a structure is to help illuminate the nature of a legal system, and this construct accomplishes that.

Second, the metaphorical structure represents a continuum of abstraction – from the law’s concrete practices to its theoretical underpinnings.<sup>13</sup> This Article does not attempt to describe all points on that continuum, nor does it care to establish its endpoints. The rules themselves, for instance, represent a level of abstraction and warrant their own inferences (related to execution, actual effect on individuals, *etc.*). And at the other extreme, principles may themselves embody other, higher-level principles, and so on. The analysis focuses on this range within the continuum for a simple, practical reason: any analysis or explanation of a social institution should, of course, be useful; it should illuminate the institution’s structure and reveal the coherence of its component parts.<sup>14</sup> Near one endpoint of the continuum, the rules of family law provide evidence, though necessarily imperfect, of actual practice. And from a purely practical perspective, they are vastly easier to work with than is, say, actual sociological data. And near the other endpoint, the principles of Biblical naturalism and liberal individualism are the most useful, in this case, because they best explain our particular legal order. An explanation of family law as an embodiment of some ultimate principle would fall short of these goals. Ultimate principles explain our need for *some* legal order.<sup>15</sup> Societal goals of self-preservation, for instance, inform the family laws of all countries; focusing on that upper-level principle, however, tells us little about *our* family law. On the other hand, the closer one moves toward the levels of legal concepts and rules, the more difficult it is to see and discuss any overarching coherence. As when viewing an impressionistic painting or a 3-D poster, one needs some distance to make sense of what on too-close inspection appears to be a pointillist mess.

Let’s turn now to the system to be analyzed.

Family law, as conceived here, comprises those sets of laws (1) whose purpose is to regulate relationships among intimates, or (2) whose

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<sup>12</sup> See COLEMAN, *supra* note 5, at 8.

<sup>13</sup> See COLEMAN, *supra* note 5, at 55 n.1.

<sup>14</sup> See COLEMAN, *supra* note 5, at 23.

<sup>15</sup> See, e.g., WAYNE MORRISON, JURISPRUDENCE: FROM THE GREEKS TO POST-MODERNISM 378-79 (1997) (discussing H.L.A. Hart’s thesis of the minimum content of natural law).

operation hinges on the existence of a certain family status or relationship.<sup>16</sup>

Certain rules directly order family life and family relationships. These include obvious examples like laws regulating marriage, divorce, and parenting. Other rules – like those governing child custody and child support – regulate intimate relationships or affect individuals based on their relationships to others; these also belong in that category. Similarly, various rules – those involving inheritance, tax, and insurance, to name a few – link important benefits and obligations to legal family status.<sup>17</sup> It would be wrong to treat these kinds of laws as outside of family law or as existing merely in the penumbra of the core family law. Indeed, a legislature may more successfully influence family composition through indirect means (*e.g.*, by subsidizing via tax benefits certain family forms but not others<sup>18</sup>) than by more direct legislation (*e.g.*, by making divorce difficult or impossible to obtain<sup>19</sup>).

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<sup>16</sup> This view of family law is consistent with the contemporary view of family in the U.S. The concept of what constitutes family and family law has evolved. Nancy Cott has noted that at common law, the concept of “domestic relations” included “the relative privileges and duties of husbands and wives, employers and employees, and masters and slaves.” NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 6-7 (2000). *See, also*, PETER W. BARDAGLIO, *RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH* 25 (1995) (“Central to the world view of . . . slaveholders was a broad conception of family, one that went beyond the nuclear unit to encompass nonnuclear kin, slaves, servants, and all other inhabitants of the plantation”). Contemporary treatises on family law more narrowly focus on relationships between intimates. *See, e.g.*, KATZ, *supra* note 8; and CLARK, *supra* note 8.

<sup>17</sup> *See infra* notes 56-59, and accompanying text. At the risk of stating the obvious, my placing certain laws or systems of laws within the “family law” category does not imply that these laws belong exclusively within that category. Laws may be considered “family law” while simultaneously falling into categories of “tax law”, “employment law”, or others.

<sup>18</sup> *See, e.g.*, EDWARD J. MCCAFFERY, *TAXING WOMEN* 11-28 (1997); Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 *TAX L. REV.* 1, 6-7 (2000).

<sup>19</sup> Historically, state legislative measures aimed at restricting divorce were unable to thwart the growing demand for dissolution. *See generally* HENDRICK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* (2000); *Developments in the Law – The Law of Marriage and Family*, 116 *HARV. L. REV.* 1996, 2087-91 (2003); Joanna L. Grossman, *Separated Spouses*, 53 *STAN. L. REV.* 1613 (2001); Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 *VA. L. REV.* 1497 (2000); Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 *CAL. L. REV.* 2017 (2000).

Legislative divorce was a practice adopted by states that allowed state legislatures to issue divorces to couples on an *ad hoc* basis if, in the opinion of

## PRINCIPLES OF U.S. FAMILY LAW

Thus defined, these varied family laws embody four underlying concepts: conjugality, contract, privacy, and *parens patriae*. These concepts organize family law.

### *B. EMBODYING CONJUGALITY AND CONTRACT: RULES OF MARRIAGE AND DIVORCE*

#### *1. Marriage and the Marital Family*

Those rules of family law that formalize and shape the institution of marriage embody the concepts of conjugality, contract, and privacy.

Conjugality is a legal status (marriage), but it is also a powerful normative concept.<sup>20</sup> The rules that both reflect and actualize the concept of conjugality include those that: permit only opposite-sex couples to marry;<sup>21</sup> limit to two the number of people who may enter into a marriage;<sup>22</sup> require that marriages be presumptively enduring and

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the legislature, the couple was deserving. Grossman, *supra*, at 1645. Until the mid-nineteenth century, this was the only way that married couples could legally divorce in most states. *Id.* at 1645. This practice gave way to judicial divorce after most states enacted bans on divorce bills, as their legislatures were unable to meet the demand for divorces. *Id.* Fault-based judicial divorce replaced legislative divorce by the end of the 19<sup>th</sup> century. See Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497 (2000). Courts granted divorces only to “innocent” spouses who could persuasively demonstrate that the breakdown of the marriage was the fault of their partners. *Id.* Through the late 19<sup>th</sup> and into the 20<sup>th</sup> century, the demand for divorce grew, and some states responded by enacting more stringent divorce laws. These measures, however, failed to reduce demand. *Id.* at 1502-03. Some husbands and wives who both wished to divorce colluded to present (perjured) evidence of fault; others traveled to states where divorce was easier to obtain. *Id.* at 1503-04. Ultimately, states accepted that efforts to enforce couples’ commitments were doomed to fail. Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79 (1991). With the single exception of Arkansas, every state in the country has thus adopted some version of a no-fault divorce regime, granting divorce upon a showing that the marriage is irretrievably broken. *Id.* at 90.

<sup>20</sup> See, e.g., Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387.

<sup>21</sup> Massachusetts is (so-far) the singular exception. *Goodridge v. Massachusetts* held the exclusion of same-sex couples from marriage “incompatible with the [Massachusetts] constitutional principles of respect for individual autonomy and equality under law.” 798 N.E.2d 941, 949 (Mass. 2003). The First Circuit in *Largess v. Massachusetts* refused to enjoin the implementation of *Goodridge*. 373 F.3d 219, 219-21 (1st Cir. 2004). Together, *Goodridge* and *Largess* made Massachusetts the first state in the union to permit same-sex marriages.

<sup>22</sup> All states prohibit polygamy. See *Reynolds v. United States*, 98 U.S. 145 (1878) (affirming criminal conviction of Mormon man who participated in plural

## PRINCIPLES OF U.S. FAMILY LAW

dissoluble only by the state;<sup>23</sup> impose on married couples – viewed in important respects as a single unit – mutual obligations of support;<sup>24</sup> and declare marriage to be the locus for legitimate sex and procreation.<sup>25</sup>

Rules governing entry into marriage have changed little since the country's founding and reflect not only the concept of conjugality, but also

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marriage); *Potter v. Murray City*, 760 F.2d 1065 (10<sup>th</sup> Cir. 1985), *cert. denied*, 474 U.S. 849 (1988) (declining to extend constitutional right to privacy to protect plural marriage).

<sup>23</sup> Every state has implemented statutes requiring judicial approval and declaration of divorce. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW*, 204-08; 498-504 (1988).

<sup>24</sup> For a discussion of the development of the notion of conjugal unity, see *infra* notes 123-25, and accompanying text. Eight states, for example, retain interspousal tort immunities, on the theory that a person can't sue him- or herself. See Jill Elaine Hasday, *The Canon of Family Law*, 57 *STAN. L. REV.* 825, 845-46 (2004). Through the doctrine of necessities, retained by two-thirds of all states, states require spouses to provide material support to each other. The doctrine requires a spouse to pay debts incurred by the other for the purchase of "necessary" items. See *Id.* at n. 34 (cataloging the states that retain the doctrine). Other rules demonstrate the notion of conjugal unity by protecting spouses' interests in each others' bodies, companionship, and services. Tort doctrines, for instance, permit a spouse to sue for loss of consortium when her partner has been injured. See Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 *HARV. L. REV.* 491, 503-04 (2005) (discussing marital consortium doctrine and cataloguing cases acknowledging doctrine). See also JoEllen Lind, *Valuing Relationships: The Role of Damages for Loss of Society*, 35 *N.M. L. REV.* 301, 314-15 (2005) (discussing the history of the claim for loss of consortium).

<sup>25</sup> The Supreme Court's decision in *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989), provides a striking example of the societal importance attributed to the conjugal family. Here, the Court held that states may decide that any child born to a married woman may be treated as a legal child of the marriage (so long as husband and wife agree to this). Actual paternity is irrelevant. And the biological father's connection affords him no rights vis-à-vis the child. What explains such a rule, where legal status creates a paternal fiction that can trump actual biological connection? The answer is a view that stable marital families are a critical social good, and thus preservation of the conjugal relationship and family outweighs recognition of biological parentage. The concept of conjugality thus explains the rule.

States have historically promoted conjugality not only by directly supporting that relationship but also by prohibiting intimate sex acts outside of marriage. Such prohibitions have all but disappeared, as courts have extended privacy protections to such acts. Yet some states retain laws (despite a near-certain inability to constitutionally enforce them, in light of the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003)) that prohibit consensual sodomy, fornication, or adultery. See *Singson v. Virginia*, 621 S.E.2d 682 (Va. Ct. App 2005) (stating that *Lawrence* did not declare all sodomy statutes facially unconstitutional). See also, e.g., *UTAH CODE ANN.* § 76-5-403(1) (2003). After *Lawrence*, the constitutional validity of any such prohibition is highly doubtful. See 539 U.S. 558, 578.

that of contract.<sup>26</sup> Embodying aspects of contract, rules require that marriages be entered voluntarily and consent freely given; marriages entered under duress or coercion, or otherwise absent true consent, are void.<sup>27</sup>

Once married, however, laws convert a couple's private relationship to a state-regulated legal status. That status is much more alterable than it once was, but even today, those of its terms considered essential to that status are unalterable. Couples usually may not alter by contract the rules that govern their ongoing marriages.<sup>28</sup> Courts refuse to enforce, for instance, agreements providing that one spouse will compensate the other for domestic services.<sup>29</sup> Their reasoning is that mutual entitlement to support and domestic services is an essential aspect of the conjugal status.<sup>30</sup>

Another basic, unalterable aspect of conjugality is its presumed lifelong status. Couples cannot pre-establish the duration of their marriages – once entered, a marriage presumptively continues until the death of either spouse. Nor may couples unilaterally dissolve their legal marriages; only the state by divorce decree may do so. Together with the essentially unalterable nature of the intact marital relationship itself, these examples demonstrate the continued primacy of the concept of conjugality in family law.<sup>31</sup> The rules of divorce have softened some of the more

<sup>26</sup> The essentials of marriage have long included both mutual consent and capacity. See WALTER C. TIFFANY, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS, ROGER W. COOLEY, ED. 6 (3d ed. 1921) [hereinafter TIFFANY'S DOMESTIC RELATIONS]. To have the "capacity" to marry, couples could face no impediment of relationship (consanguinity or other prohibited degrees of kinship), incapacity for sexual intercourse, preexisting marriage, or "civil conditions"—*i.e.*, race. *Id.* at 25-36. Tiffany notes that "in many states, marriages between negroes, Indians, or Chinese, and white persons, are prohibited." *Id.* at 30. Of these "essentials", only the requirement that the couple not violate certain racial criteria has been eliminated. See *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>27</sup> Consent must be given absent fraud, duress, mistake, or incapacity. Insanity, intoxication, or nonage could render a party incapable of giving true consent. TIFFANY'S DOMESTIC RELATIONS at 7-25. See also Elizabeth S. Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225, 1257 (1998).

<sup>28</sup> See Hasday, *The Canon of Family Law*, *supra* note 24, at 836-41.

<sup>29</sup> Hasday, *The Canon of Family Law*, *supra* note 24, at 840-41, n. 38 (cataloguing state court decisions).

<sup>30</sup> *Id.*

<sup>31</sup> See Eric A. Posner, *Family Law and Social Norms*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 256 (F.H. Buckley ed., 1999). Posner argues:

[W]e are far from a system in which parties are free to contract for any marital arrangement that they want . . . [P]otential mates cannot bind themselves legally to marriages in which spouses' domestic, financial, and sharing obligations are specified by contract. Polygamous and same-sex

constraining aspects of conjugality, but they have not altered its essential form. We turn next to those elements of family law.

## 2. *Divorce*

Unlike laws governing entry into marriage, laws governing divorce have changed radically since the country's founding.<sup>32</sup> Early laws enforced lifelong conjugality. In the colonies and the early days of the country, the marital relationship was virtually indissoluble.<sup>33</sup> States gradually permitted judicial divorce, but only to an innocent party who could prove the "fault" of his or her spouse—through adultery, violence, cruelty, incurable insanity, etc.<sup>34</sup> Not until the latter part of the twentieth century did states begin permitting couples to divorce based essentially upon a showing that they were no longer compatible.<sup>35</sup> These changes in the rules and practices of family law relaxed one of the more stringent (and least successful<sup>36</sup>) requirements of conjugality and simultaneously expanded some individuals' abilities to determine their intimate lives.

But even in the current "no-fault" era, conjugality perseveres. Divorce is not automatic, nor is it always easy. Many states in fact permit relatively quick and easy divorce only if both parties consent to the dissolution of the marriage. When one spouse opposes dissolution, family law rules require courts to put on the brakes and more deeply inquire into the couple's relationship. Usually, the petitioning spouse may then prove irreparable deterioration of the marriage relationship by showing that the couple has lived separate and apart (without engaging in sexual relations) for a statutorily prescribed period of time.<sup>37</sup> In some states, a couple must

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marriages are prohibited. These laws are . . . restrictions on freedom of marital contract, and they strikingly distinguish family law from contract law."

*Id.* Hasday has also argued that to claim that the family law has moved from status to individual ordering through contract overstates changes that have occurred. Hasday, *The Canon of Family Law*, *supra* note 24, at 834-48. Most commentators emphasize the radical changes and "contractualization" of family law. See, e.g., Jana Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (1992); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

<sup>32</sup> See Shaakirrah R. Sanders, *The Cyclical Nature of Divorce in the Western Legal Tradition*, 50 LOY. L. REV. 407 (2004) (tracking the evolution of Western divorce law).

<sup>33</sup> See *supra* note 19, and accompanying text.

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> More than half of all state divorce statutes impose "separate-and-apart" requirements. Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 21 FAM. L.Q. 417, 442 tbl.1 (1988).

be separated for at least two years before a court will grant a divorce over the objection of one of the parties.<sup>38</sup>

Even when they allow marital bonds to be severed, states' laws have historically treated marital obligations of support (usually a husband's duty to support his wife) as enduring.<sup>39</sup> Alimony or spousal support has since become less favored (and officially gender-neutral).<sup>40</sup> Its goals have also evolved from ensuring ongoing support to include "rehabilitating" a spouse who has been unemployed or underemployed during the marriage in order to facilitate her reentry into the workforce, thus ensuring economic self-sufficiency;<sup>41</sup> and reimbursing a spouse who has contributed (usually services) to the marriage "partnership".<sup>42</sup> Parties generally have the freedom, moreover, to privately order through contract some of the important consequences of marital dissolution.<sup>43</sup>

Family law rules that permit couples to enter agreements establishing the financial consequences of dissolution actualize the concept of contract. States (with varying degrees of skepticism) generally recognize and enforce premarital agreements that set the financial terms of dissolution.<sup>44</sup>

Some of the legal rules affecting marriage and divorce reflect the concept of contract, and many of the developments in these family law rules aim to further equality and individual self-determination. But

<sup>38</sup> Ten states and Puerto Rico impose a two-year minimum separate-and-apart requirement. Freed & Walker, *Family Law in the Fifty States*, *supra* note 37, at 442 tbl.1.

<sup>39</sup> Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 122 (2004).

<sup>40</sup> See Lee. E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1162 (1985).

<sup>41</sup> Michelle Murray, *Alimony as an Equalizing Force in Divorce*, 11 J. CONTEMP. LEGAL ISSUES 313, 314 (1997).

<sup>42</sup> Murray, *supra* note 41, at 313.

<sup>43</sup> The Uniform Premarital Agreement Act, adopted by half of the states, authorizes couples to determine by contract the financial consequences of the marriage's dissolution. UNIF. PREMARITAL AGREEMENT ACT (1983). But aspects of those agreements that purport to resolve nonfinancial issues such as custody of children or conduct during the marriage are typically not binding. See, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 7.08 (2002).

<sup>44</sup> See Jill Elaine Hasday, *Intimacy and Economic Exchange*, *supra* note 24, at 507 (noting that prenuptial agreements were not favored by early common law, but modern state courts generally recognize and even encourage the use of these agreements); Karen Servidea, *Reviewing Premarital Agreements to Protect the State's Interest in Marriage*, 91 VA. L. REV. 535, 536-40 (2005) (tracking the historical development of premarital agreements, and state courts' increasing willingness to enforce them); *Developments in the Law – The Law of Marriage and Family*, *supra* note 19, at 2075-98 (outlining developments in the enforcement of prenuptial agreements).

conjugal­ity’s essential aspects (as legal status and normative concept) remain, and remain largely unchanged.

We turn now to the laws of parenting and child welfare.

C. *EMBODYING CONJUGALITY, PRIVACY AND PARENS PATRIAE: RULES OF PARENTING AND CHILD WELFARE*

The concept of privacy restrains the state’s ability to interfere in the family. Its counterpoise, *parens patriae*, empowers the state to interfere when necessary to protect families’ more vulnerable members.<sup>45</sup> Along with conjugal­ity, these concepts are embodied in the various rules governing parenting and child welfare.

Long before the Supreme Court explicitly named it a constitutionally-protected individual right, states implicitly recognized and respected the concept of family privacy.<sup>46</sup> The concept of family privacy historically recognized paternal authority over and obligations towards both wives and children.<sup>47</sup> Today, that concept shapes family law rules that largely permit parents to raise their children as they see fit, generally free from state interference. Parents share significant authority—a constitutionally-protected fundamental “right”—over their children.<sup>48</sup>

The concept of family privacy is in tension with the concept of *parens patriae*. Family laws have expanded the state’s powers to protect children.<sup>49</sup> But the expansion of the influence of *parens patriae* on rules of parenting and child welfare does not necessarily demonstrate a weakening of respect for parents’ rights and family privacy; but instead, both (1) an increased recognition of children as full persons, themselves entitled to individual rights; and (2) the state’s own interest in its future citizenry.

Indeed, *parens patriae* has not come close to superseding the concept of family privacy, especially that of the conjugal family.<sup>50</sup> The state intervenes in the “intact” family in limited situations<sup>51</sup> – namely, when it perceives a serious threat to the physical or mental health of the child, and even then, not in all cases.<sup>52</sup>

<sup>45</sup> See *supra* note 10.

<sup>46</sup> See *infra* notes 131-132, and accompanying text.

<sup>47</sup> See *infra* notes 154-159, and accompanying text.

<sup>48</sup> Santosky v. Kramer, 455 U.S. 745, 759 (1982).

<sup>49</sup> See *infra* notes 172-176, and accompanying text.

<sup>50</sup> See *supra* note 25, and accompanying text.

<sup>51</sup> CLARK, *supra* note 8, at § 9.4.

<sup>52</sup> See, e.g., Troxel v. Granville, 530 U.S. 57 (2000) (“[So long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family”); Marjorie Frieman, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 GEO. WASH. L. REV. 243 (1982). The state has struggled with cases

The “best interests of the child” standard expresses the state’s *parens patriae* role and has been widely adopted by state legislatures to guide judges making custodial and other decisions related to children. But this standard is not intended to ensure that parents generally act in the “best interests” of their children. Instead, parents are presumed to act in their children’s best interests.<sup>53</sup> When marriages or nonmarital households in which children are being raised fail, parties sometimes turn to the judicial system to resolve child custody disputes. But judges make a small percentage of custody determinations; generally, parents agree to a post-dissolution custodial arrangement.<sup>54</sup>

Once in the courts, respect for family privacy and parental rights can clash with, and indeed supersede, children’s interests and the state’s *parens patriae* power. Even after a child has bonded with a non-parent caretaker (in the event a parent has been found neglectful or has temporarily surrendered custody of her child to another), for instance, the parent seeking to regain custody will almost always have a superior claim to custody over his or her natural child. When courts decide such “parent vs. third-party” claims, they generally may not order a custodial arrangement they consider to be in a child’s best interests acontextually; the parent benefits from the proverbial thumb on the scale.<sup>55</sup>

The concepts of family privacy and conjugality are expressed by rules that respect the notion of parents’ “rights” over their children. But parents’ rights are by no means absolute; increased recognition of children

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where parents refuse medical care for a seriously ill or disabled child because of their assessment that treatment will be futile. A federal statute characterizes medical non-treatment as a form of child abuse. Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. §§ 5101-5105 (1999), and Child Abuse Amendments of 1984, 42 U.S.C. § 5106(g) (1994). However, CAPTA requires states to include spiritual treatment exemptions to protect those parents whose refusal to consent to medical treatment for a child is based on religious beliefs. *Id.* But subsequent regulations promulgated pursuant to CAPTA by the Department of Health, Education and Welfare excluded the spiritual treatment exemption. See Elizabeth A. Lingle, *Treating Children by Faith: Colliding Constitutional Issues*, 17 J. LEGAL MED. 301, 307 (1996). For a discussion focusing on children’s rights, see James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws, as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321 (1996).

<sup>53</sup> *Troxel v. Granville*, 530 U.S. 57 (2000) (“[T]here is a presumption that fit parents act in the best interests of their children.”).

<sup>54</sup> Courts generally respect parental decision-making and approve child custody arrangements reached by parents; and in 80 to 90 percent of cases, parents do reach agreement. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 134 (1992).

<sup>55</sup> See *Developments in the Law – The Law of Marriage and Family*, *supra* note 19, at 2053-54.

as individuals in their own right, needing and deserving protection, helps explain the state's *parens patriae* interventions in the private family.

*D. EMBODYING ALL OF THE ABOVE: RULES THAT DEPEND ON FAMILY STATUS*

Laws whose operation hinges on family status embody the same concepts identified and discussed above, but in particular conjugality. Employment and insurance laws, tax laws, probate and inheritance laws, evidentiary rules, and aspects of tort law condition legal rights and financial benefits on the legal status of familial relationships.<sup>56</sup> Married couples receive myriad public protections and benefits, including social security insurance, employment and retirement benefits, inheritance and estate benefits, and entitlements under federal immigration law, to name but a few.<sup>57</sup> Most of these laws support the conjugal relationship and family; the exceptions are generally, at worst, neutral with respect to family form.<sup>58</sup> Social Security, for instance, ensures the financial security of a non-wage-earning spouse or former should her partner become incapacitated or die.<sup>59</sup> A non-wage earning single parent, however, must

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<sup>56</sup> See 42 U.S.C. §402(a)-(e) (providing derivative Social Security insurance benefits to the spouse, ex-spouse, or widow of an insured worker); Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (regulating private employee benefit plans and allocating rights according to family status); 8 U.S.C. § 1151(b)(2) (2000) (exempting from numerical limitations on immigration individuals according to family status). See also, Report to the Honorable Henry J. Hyde, Chairman, Committee on the Judiciary, House of Representatives, "The Defense of Marriage Act," Jan. 31, 1997, Federal Document Clearing House, General Accounting Office, GAO/OCG 97-16 (reporting that more than 1,000 places in federal law alone link rights or benefits to marriage). See also *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993) (listing the many benefits provided exclusively to the marital couple, including: state income tax advantages, public economic assistance (including Social Security benefits), property rights, child custody awards, dower payments, inheritance rights, the right to spousal support, and the automatic right to change one's name).

<sup>57</sup> *Id.*

<sup>58</sup> One sometime – and unintentional – exception is the so-called "marriage penalty", where some dual-income marital families pay higher federal taxes than if they were to file singly. Some commentators argue that the federal tax structure benefits the marital family with a single- or primary-wage-earning spouse. See, e.g., EDWARD J. MCCAFFERY, *TAXING WOMEN* 11-28 (1997); Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 6-7 (2000); Marjorie Kornhauser, *Love, Money and IRS: Family, Income-Sharing and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 64 (1993).

<sup>59</sup> See *supra* note 56, and accompanying text.

## PRINCIPLES OF U.S. FAMILY LAW

rely on need-based public programs that provide subsistence-level assistance.<sup>60</sup> Such programs emphasize self-sufficiency, but increasingly are including incentives for poor families to conform to conjugal norms.<sup>61</sup>

Myriad laws more incidentally affect families but don't belong in the category of family law. Compulsory education laws, for example, constrain parents' freedom to educate or not educate their children in the manner in which they see fit. Mandatory immunization laws similarly deprive parents of some control over their children. The purpose of such laws, however, is not to affect families or family life; nor does their operation depend upon family status.<sup>62</sup> In both examples, interference with parental authority is necessary but incidental. In short, while most laws affecting children interfere in some way with parental authority, they ought not all be considered family law as such.

The legal rules, or elements, of U.S. family law thus embody underlying concepts of conjugality, privacy, contract, and *parens patriae*. The next Part argues that these concepts in turn embody underlying ideals, or principles.

### II. PRINCIPLES OF FAMILY LAW

“[I]n certain kinds of practices, the inferential roles of concepts may be seen to hang together in a way that reflects a general principle. The principle can then be said to be *embodied in the practice* and, at the same time, to explain it.”<sup>63</sup>

The concepts of U.S. family law discussed above embody two foundational principles: Biblical naturalism and liberal individualism.<sup>64</sup>

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<sup>60</sup> See Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299 (2002).

<sup>61</sup> See Personal Responsibility, Work, and Family Promotion Act of 2003, H.R. 4, 108<sup>th</sup> Cong. §103(b) (providing \$100 million/year to states for “healthy marriage promotion activities”).

<sup>62</sup> The goals of compulsory education, for instance, include helping secure the future liberty of the individual child and ensuring the future well-being of both the child and of society generally. To that end, public education is provided by the state directly and without cost to all U.S. children. Similarly, mandatory immunization laws reflect public health concerns.

<sup>63</sup> COLEMAN, *supra* note 5, at 8.

<sup>64</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22 (1977). Dworkin uses the term “principle” to refer to “a standard that is to be observed . . . because it is a requirement of justice or fairness or some other dimension of morality.” *Id.* A principle states or embodies a social goal or political value. See also, BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 87 (3d ed. 2004) (defining principles as “moral propositions that are stated in or implied by past official acts.”).

Principles inform legislative and judicial pronouncement of rules. See DWORKIN, *supra*, at 22. “They seem most energetically at work, carrying most

## PRINCIPLES OF U.S. FAMILY LAW

The following Sections examine first the development of the principles, and then the mechanics and character of their influence on U.S. family law.

### A. *BIBLICAL NATURALISM AND ITS INFLUENCE ON U.S. FAMILY LAW*

“[W]hen the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart . . .”<sup>65</sup>

That the Judeo-Christian tradition has helped shape U.S. family law is quite beyond dispute.<sup>66</sup> Law and religion scholar John Witte, Jr. reminds us that “[t]he laws born of the Catholic and Protestant models of marriage are not the artifacts of an ancient culture . . . Until the twentieth century, this was our law in much of the West, notably in England and America.”<sup>67</sup>

There are two, more disputable issues: The first involves identifying the contours of this tradition through its inferential role in the concepts and practices of U.S. family law.<sup>68</sup> This Article argues that family law’s concepts and practices combine in a way that reflects a pre-modern<sup>69</sup> view

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weight, in difficult lawsuits . . . [In these difficult cases,] principles play an essential part in arguments supporting judgments about particular legal rights and obligations. After the case is decided, we may say that the case stands for a particular rule. . . But the rule does not exist before the case is decided; the court cites principles as its justification for adopting and applying a new rule.”

<sup>65</sup> WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* VOL. I (1807). Blackstone refers here to the creation story of Genesis.

<sup>66</sup> Its influence, however, has received surprisingly little scholarly attention from the legal academy. Allusions to the Christian derivation of U.S. family practice are not uncommon, but few legal commentators have systematically explored the connection. One exception is John Witte, Jr., who has traced the influence of Christian theological traditions on the development of Western legal principles. JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* (1997). Witte focuses on the various different Christian theologies (Roman Catholic, Lutheran, Calvinist, and Anglican) and their effect primarily on Western Europe, but also on the United States. *See also*, FRANCES GIES AND JOSEPH GIES, *MARRIAGE AND THE FAMILY IN THE MIDDLE AGES* 36-42 (1987) (discussing the historical impact of Christianity on family life generally). *See generally*, Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 *HOW. L.J.* 173 (1992).

<sup>67</sup> *See* WITTE, *supra* note 66, at 12. *See also*, MARY ANN GLENDON, *STATE, LAW, AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE* (1977).

<sup>68</sup> *See* COLEMAN, *supra* note 5, at 8.

<sup>69</sup> Significant differences exist between medieval (or pre-modern) and modern theories of natural law. Pre-modern theories argued the existence of a universal law derived from God, and the existence of objective moral principles

of natural law filtered through Judeo-Christian theology—Biblical naturalism. The second issue is the extent to which this tradition continues to animate our law. The conventional wisdom is that the progress of U.S. family law has been a steady march “from status to contract” or from public to private ordering.<sup>70</sup> This Article counters that Biblical naturalism retains a powerful grasp on our family law even – or perhaps especially – today.

The next three Sections trace the development of the key ideas that make up Biblical naturalism<sup>71</sup> and describe its specific influences on family law. They argue that this principle has not only remained a strong undercurrent in U.S. family law, but also that it is enjoying a period of renewed prominence and influence in public discourse. The first and second Sections highlight significant aspects of the Jewish and Christian family traditions, respectively. The third Section discusses pre-modern natural law theories that predominated in the early U.S. and which incorporated key elements of the Judeo-Christian tradition, helping shape first English, then U.S. family law.

### 1. *The Jewish Tradition*

The Hebrew Covenant, recorded between the latter half of the ninth and early part of the eighth centuries B.C., set down laws that had been in effect for as many as three hundred years prior.<sup>72</sup> While Jewish society was in many respects similar to other societies of the time,<sup>73</sup> Hebrew law is notable in that its more than 600 commandments purportedly come

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dictated by nature and discoverable by reason. See LLOYD WEINREB, *NATURAL LAW AND JUSTICE* 53 (1987). The Renaissance saw the beginning of the secularization of natural law. *Id.* at 108-10. In the 18<sup>th</sup> century, Hume developed a modern, secular theory of natural law. See D. FORBES, *HUME’S PHILOSOPHICAL POLITICS* (1975).

<sup>70</sup> See *supra* note 31, and accompanying text.

<sup>71</sup> For more exhaustive treatment of the history of the Church and family, see generally, THEODORE MACKIN, *MARRIAGE IN THE CATHOLIC CHURCH: DIVORCE AND REMARRIAGE* (1984).

<sup>72</sup> Frank Alvarez-Pereyre and Florence Heymann, *The Desire for Transcendence: the Hebrew Family Model and Jewish Family Practices*, in *A HISTORY OF THE FAMILY VOL. I: DISTANT WORLDS, ANCIENT WORLDS* 155 (Andre Burguière, *et al.*, eds., Belknap Press of Harvard Univ. Press 1996). The five Books of Moses (the Pentateuch) – the foundation of Hebrew law – are complemented by the Talmud, a body of rabbinical writings which seeks to define rules and laws even more precisely. *Id.* at 155, 158.

<sup>73</sup> Jean-Jacques Glassner, *From Sumer to Babylon: Families as Landowners and Families as Rulers*, in *A HISTORY OF THE FAMILY VOL. I: DISTANT WORLDS, ANCIENT WORLDS* 104 (Andre Burguière, *et al.*, eds., Belknap Press of Harvard Univ. Press 1996).

directly from God.<sup>74</sup> Its provisions have thus carried throughout history the added weight of divine ordination. A description of these provisions germane to family law follows.

*Patriarchy.* One of Jewish law's most important provisions concerned male leadership of the family. In the Old Testament, God enters into a Covenant with Abraham alone, excluding his wife Sarah and giving "divine sanction to the leadership of the patriarch over his family and tribe."<sup>75</sup> The patriarch exercised authority over his wife and children, and the practice of agnatic descent ensured the continuation of that authority through future generations.

*Monogamy and polygyny.* Jewish law favored monogamy but did not forbid concubinage and polygyny.<sup>76</sup> Thus while some Jewish communities were monogamous, in others, polygyny endured well into the Middle Ages. In some communities, demographic and economic pressures limited its practice (a man had to be wealthy to obtain and maintain numerous wives); in others local civil laws and custom (including in Christian environments) squelched the practice.<sup>77</sup>

*Entry into marriage.* In order to effectuate a legal marriage, Hebrew marriage law required payment by the man's father to the future wife's father, and the transfer to the wife of a dowry by her father.<sup>78</sup> The couples' consent was important, and the marriage became effective after the couple had executed a contract (*ketubah*), cohabited, and consummated their relationship.<sup>79</sup>

*Procreation.* The importance of marital procreation is highlighted early in the Old Testament, where God directs man and woman to "be fruitful and multiply."<sup>80</sup>

<sup>74</sup> MOSES MIELZINER, *THE JEWISH LAW OF MARRIAGE AND DIVORCE IN ANCIENT AND MODERN TIMES, AND ITS RELATION TO THE LAW OF THE STATE* (Fred B. Rothman & Co. 1987) (1884) "The Bible contains laws as well as ethical doctrines . . . [A]ll laws contained in these books of Moses are proclaimed in the name of God, who is the source of all ethical truth . . ." *Id.* at 14.

<sup>75</sup> GERDA LERNER, *THE CREATION OF PATRIARCHY* 190 (1986).

<sup>76</sup> MIELZINER, *supra* note 74. Mielziner notes that the law "endured" polygamy but did not sanction it. Parts of the Old Testament provide for polygyny (21 Exodus 9; 18 Leviticus 18; 21 Deuteronomy 15-17), but other provisions presume monogamy as the norm (20 Deuteronomy 7; 24:5; 25:5-11).

<sup>77</sup> Alvarez-Pereyre & Heymann, *supra* note 72, at 182-84. (It should be noted that "[b]y [Judaism's] Roman period, monogamy seems to have been the common practice." *THE OXFORD COMPANION TO THE BIBLE* 496 (Bruce M. Metzger and Michael D. Coogan, eds., 1993).

<sup>78</sup> 22 Exodus 15-16; 22 Deuteronomy 28-29. Alvarez-Pereyre & Heymann, *supra* note 72, at 175. With trivial exception, the consent of both parties was also required. MIELZINER, *supra* note 74, at x.

<sup>79</sup> Pereyre & Heymann, *supra* note 72, at 175-76.

<sup>80</sup> 1 Genesis 28.

*Ending marriage.* A husband could unilaterally divorce his wife by giving her a bill (a *get*) terminating their marriage and dismissing her.<sup>81</sup>

These key elements of Jewish family law were then absorbed, for the most part, into the Christian tradition. The Christian family tradition, however, differs in a number of important respects from that of the Jewish tradition.<sup>82</sup> The next Section touches on its more important elements and notes several significant areas where the Christian family tradition diverges from its Jewish roots.

## 2. *The Christian Tradition*

The early Christian church viewed marriage as “subject to the law of nature, communicated in reason and conscience, and often confirmed in the Bible.”<sup>83</sup> Jesus and St. Paul both spoke at length about the marital family, “and their teachings have been the cornerstone of the Western tradition of marriage for nearly two millennia.”<sup>84</sup> Beginning with their formalization in the twelfth century, the church’s theology and laws of marriage became widely communicated and profoundly influential.<sup>85</sup> A description of its primary family traditions follows.

*Patriarchy/marital unity.* The husband’s authority over the marital household in the Jewish tradition gave way in the New Testament to a more explicit description of the married couple as a unit, led by the husband: Paul’s letters to the early Christian churches teach that husbands and wives “shall become one flesh”, but that “the husband is the head of the wife.”<sup>86</sup> The Christian tradition thus retained the patriarchy of the Jewish tradition but placed greater emphasis on unity.

*Monogamy.* The combination of monogamy and polygyny that had existed in the Jewish tradition gave way to a full commitment to monogamy in early Christianity.<sup>87</sup> The primary purpose of monogamy was not procreation, however, but chastity. The early Church sought to control sexual desires and sexual conduct; some, including St. Augustine,

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<sup>81</sup> 24 Deuteronomy 1. Pereyre & Heymann, *The Desire for Transcendence: the Hebrew Family Model and Jewish Family Practices*, *supra* note 72, at 178-79. This allowance for divorce ended sometime after the beginning of Christianity. MIELZINER, *supra* note 74, at x.

<sup>82</sup> GIES & GIES, *supra* note 66, at 37-40 (noting that, in comparing the Old and New Testaments, theologian St. Augustine “found a number of recurring tenets but not a completely harmonious consistency” and discussing key family-related distinctions).

<sup>83</sup> WITTE, *supra* note 66, at 25.

<sup>84</sup> *Id.* at 16.

<sup>85</sup> GIES & GIES, *supra* note 66, at 37; WITTE, *supra* note 66, at 16.

<sup>86</sup> 5 Ephesians 23-32.

<sup>87</sup> NANCY COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 5-6 (2000).

viewed sex as *per se* sinful.<sup>88</sup> Celibacy, which encouraged a close spiritual connection to the kingdom of God, was thought to be superior to marriage.<sup>89</sup> But monogamous marriage was still useful, according to one early theologian, because it “sets a limit to desire by teaching us to keep one wife [and] is the natural remedy to eliminate fornication.”<sup>90</sup> God created marriage “to make us chaste, and to make us parents.”<sup>91</sup> Marriage was a “remedy” provided by God for otherwise-illicit lust.

*Entry into marriage.* Church teachings emphasized the importance of mutual consent and voluntariness for marriage to be legitimate.

*Procreation and sex.* The Old Testament made procreation mandatory,<sup>92</sup> but the New Testament merely paid it lip-service.<sup>93</sup> St. Augustine, already viewing the world as old and in decline, observed in the fifth century that “there is not the need for procreation that there once was.”<sup>94</sup>

Nonetheless, during the Reformation, procreation eclipsed libido-control as the primary goal of marriage. Marital procreation was a good, although it remained a lesser good than celibate spirituality and contemplation. Marriage’s secondary goal, however, continued to be the control of sinful lust. Marriage rendered sex, not good, but licit. But it perpetuated the species and expanded the Church. The Church thus came to prohibit contraception, abortion, and infanticide.<sup>95</sup>

The Church sought to closely control sex generally. St. Paul’s letters contain litanies of prohibited sexual sins, which included lust, homosexuality, sodomy, prostitution, polygamy, and excessive primping.<sup>96</sup>

*Ending marriage.* Another significant difference between the early Jewish and Christian traditions concerned the end of marriage. As noted above, a Jewish husband could divorce his wife, on his terms.<sup>97</sup> This became impossible in the Christian tradition, with a single exception – a man could divorce a wife who had herself fornicated or committed

<sup>88</sup> WITTE, *supra* note 66, at 21.

<sup>89</sup> One early Church thinker, on a scale of values, rated virginity at 100, widowhood at 60, and marriage at 30. DAVID HERLIHY, *MEDIEVAL HOUSEHOLDS* 22 (1985); GIES & GIES, *supra* note 66, at 39.

<sup>90</sup> WITTE, *supra* note 66, at 20 (quoting John Chrysostom, *Sermon on Marriage*, in ST. JOHN CHRYSOSTOM ON MARRIAGE AND FAMILY LIFE 85 (St. Vladimir’s Press 1986). *See also* 1 Corinthians 7.

<sup>91</sup> WITTE, *supra* note 66, at 24.

<sup>92</sup> 1 Genesis 28.

<sup>93</sup> GIES & GIES, *supra* note 66, at 37.

<sup>94</sup> ST. AUGUSTINE, *TREATISES ON MARRIAGE AND OTHER SUBJECTS* 21-22 (Charles T. Wilcox, *et al.*, trans., New York 1955).

<sup>95</sup> WITTE, *supra* note 66, at 25.

<sup>96</sup> *Id.* at 18.

<sup>97</sup> *See supra* note 81, and accompanying text.

adultery.<sup>98</sup> Otherwise, only through annulment of a marriage, which required a finding that a valid marriage never existed, could a person leave a spouse and remarry another.<sup>99</sup> Jesus himself emphasizes the enduring nature of the marital commitment with the words, “what God has joined together, no man must separate.”<sup>100</sup> And emphasizing the break from the Jewish tradition, he continued that “[f]or your hardness of heart, Moses allowed you to divorce your wives, but from the beginning it was not so . . . [W]hoever divorces his wife . . . and marries another commits adultery.”<sup>101</sup>

Medieval theologian Thomas Aquinas offered both sacramental and naturalistic justifications for the indissolubility of marriage. First, he argued that marriage is a sacrament through which a couple becomes part of the perpetual union of Christ and the Church.<sup>102</sup> Their union, moreover, mirrors that union. Thus marriage must similarly be an indissoluble union. Second, Aquinas argued that nature intended marriage to be “oriented to the nurture of offspring . . . [S]ince offspring are the good of both husband and wife together, the latter’s union must remain permanently, according to the dictate of the law of nature.”<sup>103</sup>

Later canon law permitted both husbands and wives to seek legal separation (divorce from bed and board, or *a mensa et thoro*), but continued to prohibit complete divorce.<sup>104</sup> Church courts granted legal separations in cases of adultery, desertion, or cruelty.<sup>105</sup>

### 3. *The Natural Law Tradition*

English family law’s historical and ideological origins can be traced directly to natural law principles, as “revealed” by Biblical teaching, including, of course, the Biblical teaching described in the previous two Sections. Natural law theories, as conceived from the Medieval period through the Reformation,<sup>106</sup> essentially asserted the existence of objective

<sup>98</sup> 19 Matthew 9; GIES & GIES, *supra* note 66, at 38.

<sup>99</sup> Note that Judaism after Christianity evolved such that its views divorce and practice with regard to monogamy came to closely match those of Christianity. See Pereyre & Heymann, *supra* note 72, at 178-79. MIELZINER, *supra* note 74, at x.

<sup>100</sup> 19 Matthew 6-9.

<sup>101</sup> 19 Matthew 6-9.

<sup>102</sup> THEODORE MACKIN, MARRIAGE IN THE CATHOLIC CHURCH: DIVORCE AND REMARRIAGE 342 (1984) (discussing Thomas Aquinas, *Commentary on the Sentences*).

<sup>103</sup> *Id.* (quoting Thomas Aquinas, *Commentary on the Sentences*).

<sup>104</sup> WITTE, *supra* note 66, at 36.

<sup>105</sup> WITTE, *supra* note 66, at 65.

<sup>106</sup> One may trace natural law positions, of course, to the classical Greek and Roman writers, including the Stoics, Plato, and Cicero. See BRIAN BIX, JURISPRUDENCE, THEORY AND CONTENT 66-67 (3d ed. 2004). Important aspects

moral principles imposed by a divine creator and (more or less) discoverable by reason.<sup>107</sup> In his seminal COMMENTARIES ON THE LAWS OF ENGLAND, William Blackstone finds in natural law principles coherence in the disparate judicial opinions that constituted English common law.<sup>108</sup> Blackstone is important, not because he was an especially innovative legal theorist – he wasn’t – but because so many early U.S. lawyers and lawmakers closely studied his writings.<sup>109</sup> In the Introduction to the COMMENTARIES, Blackstone links the core principles of English common law to divinely-inspired Biblical scripture. Under this view, God has set down certain immutable laws of nature, which may be discovered by humans and must not be contravened.<sup>110</sup> Human faculties of reason (imperfect ever since Adam’s transgression in the Garden of Eden) are alone not up to the task of uncovering these truths. But “Divine Providence”, through the holy scriptures, has intervened and revealed God’s law.<sup>111</sup>

Early American lawmakers struggled to accommodate both their religious convictions, which mandated certain family practices, and their commitment to establishing a country that respected religious liberty. Principles of natural law helped them mediate these tensions by allowing them to incorporate their religious beliefs into law under theism, detached from any single denomination or theology.

#### 4. *Its Influence on U.S. Family Law*

##### a. *The Mechanics*

The Christian religion ascended and triumphed throughout Europe by the fourth century, with the Roman Catholic Church becoming history’s first great religious organization.<sup>112</sup> The Church’s efforts to bring broader marital behavior under ecclesiastical administration and the canon law took centuries.<sup>113</sup> Having accomplished this, the Church then had to

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of the theory change, however, with the early Church writers. *Id.* It is their conception of natural law that most directly influenced the Western tradition and U.S. law.

<sup>107</sup> M.D.A. FREEMAN, LLOYD’S INTRODUCTION TO JURISPRUDENCE 90-110 (7<sup>th</sup> ed., 2001).

<sup>108</sup> BLACKSTONE, *supra* note 65.

<sup>109</sup> As one commentator has noted, “All of our formative documents – the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall – were drafted by attorneys steeped in Sir William Blackstone’s *Commentaries on the Laws of England.*” ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 11 (1984).

<sup>110</sup> *See supra* note 65.

<sup>111</sup> *Id.*

<sup>112</sup> GIES & GIES, *supra* note 66, at 36-37.

<sup>113</sup> COTT, *supra* note 87, at 5.

grapple for a few more centuries with English and Continental monarchs. Reformers protested the Church’s jurisdiction over marriage and its enforcement of canon law. In the sixteenth century, monarchs successfully wrested from the Catholic Church this control,<sup>114</sup> and Protestant theology helped justify the adoption of civil (as opposed to purely religious) marriage statutes.<sup>115</sup> The Protestant reformations differed somewhat theologically, but they all emphasized the importance of marriage to civil society, and the propriety of state and community involvement.<sup>116</sup>

At the same time, however, the monarchies – the English being the most relevant for our purposes – got exactly what they wrested, a Biblical Naturalist understanding of marriage and family law. The reformers accepted and incorporated much of the traditional canon law; that law remained part of the common law of both Protestant and Catholic Europe into the late-eighteenth centuries.<sup>117</sup> As a result, English marriage laws in the sixteenth century did not differ significantly from those of the medieval Catholic tradition.<sup>118</sup>

Seventeenth-century English theologians proffered the commonwealth model of marriage and the family to defend then-existing laws. This model “helped to substantiate the traditional hierarchies of husband over wife, parent over child, church over household, [and] state over church”.<sup>119</sup>

British colonists brought to America with them then-prevailing British laws,<sup>120</sup> and we thus find the roots of U.S. family law in early modern England.<sup>121</sup> The English common law passed to and was largely accepted by early American civil authorities. The congruence between citizens’ and the government’s views on marriage reinforced the influence of the Bible on this elemental part of early American family law:

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<sup>114</sup> *Id.* at 5.

<sup>115</sup> WITTE, *supra* note 66, at 42-43.

<sup>116</sup> WITTE, *supra* note 66, at 44-45.

<sup>117</sup> *Id.* at 44.

<sup>118</sup> *Id.* at 131.

<sup>119</sup> *Id.* at 131.

<sup>120</sup> JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN UNDER THE STATUTES OF THE SEVERAL STATES AND AT COMMON LAW AND IN EQUITY, VOL. I [hereinafter BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN I], 1 (1873, reprint ed. 1987). *See also*, JOEL PRENTISS BISHOP, BISHOP ON MARRIAGE AND DIVORCE, WITH THE EVIDENCE, PRACTICE, PLEADINGS, AND FORMS; ALSO OF SEPARATIONS WITHOUT DIVORCE, AND OF THE EVIDENCE OF MARRIAGE IN ALL ISSUES, VOL. I [hereinafter BISHOP ON MARRIAGE AND DIVORCE I], 36 (5<sup>th</sup> ed., 1873).

<sup>121</sup> BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN, *supra* note 65, at 1. Bishop observed that “the law of married women came originally to us from England with the general mass.” *Id.*

The Christian religious background of marriage was unquestionably present and prominent. It was adopted in and filtered through legislation. For Americans who envisioned marriage as a religious ceremony and commitment, the institution was no less politically formed and freighted; yet they were unlikely to object to secular oversight when both the national and the state governments aligned marriage policies with Christian tenets.<sup>122</sup>

*b. The Concept of Conjugalinity*

Biblical naturalism thus shaped early Western concepts of family law, including that of conjugalinity. And the conjugal concept found its most significant expression in early U.S. family laws implementing the Biblically-derived unity of husband and wife<sup>123</sup> Early family law rules – like the New Testament—declared the marital couple a single unit, headed by the husband. That unity took legal form in the doctrine of coverture, in which the wife’s legal personhood became subsumed into her husband’s.<sup>124</sup> Wives ceased to exist as separate legal entities and were unable to execute legal documents or own assets without their husbands’ cooperation.<sup>125</sup>

Other aspects of Biblical tradition that were present in early American law included the importance of free consent for the creation of a valid marriage, and the (theoretically) indissolubility of marriage. While the latter reinforced the importance of conjugalinity, the former foreshadowed the increasing importance of the concept of contract in family law.

In many important respects, aspects of the principle of Biblical naturalism and the concept of conjugalinity both continue to be embodied in and effectuated by U.S. family laws. Its rules define and carefully circumscribe membership in marriage and the marital family; establish unalterable terms governing the intact marriage, viewing the conjugal couple in many respects as a single unit;<sup>126</sup> presume marriages to be enduring; and require state declaration for legal dissolution. And state

<sup>122</sup> COTT, *supra* note 87, at 9.

<sup>123</sup> *Id.* at 10.

<sup>124</sup> See NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* 158-59 (1982); COTT, *supra* note 87, at 10-12.

<sup>125</sup> COTT, *supra* note 87, at 11-12. When a man and woman married, [T]he common law turned the married pair legally into one person—the husband . . . This legal doctrine of marital unity was called *coverture* . . . Coverture in its strictest sense meant that a wife could not use legal avenues such as suits or contracts, own assets, or execute legal documents without her husband’s collaboration . . . And the husband became the political as well as the legal representative of his wife, disenfranchising her.

*Id.*

<sup>126</sup> See *supra* note 24.

restrictions on consensual non-marital and extra-marital sexual activities persist, despite the Supreme Court's recent decision in *Lawrence v. Texas*.<sup>127</sup>

The continued vitality of the concept of conjugality is evident, moreover, in the widely perceived moral superiority of the marital family as the "natural" and optimal family form. Recent events and policies reflect these views. When it enacted the 1996 Welfare Act, for example, the federal government explicitly identified marriage formation as one of the goals of the statute.<sup>128</sup> States are increasingly adopting such programs, aimed both at their poor as well as their general populations. The Defense of Marriage Act, the proposed Federal Marriage Amendment, and proliferating state constitutional amendments restricting marriage to opposite-sex couples all seek to all seek to reinforce traditional conjugality.<sup>129</sup> Because much opposition to homosexual marriage stems from beliefs with origins in Biblical naturalism,<sup>130</sup> these notable examples

<sup>127</sup> See *supra* note 25.

<sup>128</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §§ 601-19 (2000).

<sup>129</sup> The Defense of Marriage Act (DOMA) ensures that same-sex couples receive no federal spousal benefits by defining "spouse" and "marriage" to include only the union of a man and woman. 28 U.S.C. § 1738(c) (Supp, 1998). It also declares that the Constitution's Full Faith and Credit Clause (ART. IV, §1) does not require states to recognize same-sex marriages formalized in other states. 28 U.S.C. § 1738(c). The Federal Marriage Amendment states: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman." H.R.J. Res. 39, 109<sup>th</sup> Cong. (2005). To date, thirty-eight states have statutes or constitutional amendments restricting marriage to opposite-sex couples. See <http://www.lambdalegal.org/cgi-bin/iowa/news/fact.html?record=1427> (last visited Mar. 3, 2006) (listing states with statutory or constitutional provisions).

<sup>130</sup> See, e.g., John J. Coughlin, *Natural Law, Marriage, and the Thought of Karol Wojtyla*, 28 FORDHAM URB. L.J. 1771, 1774 (2001):

[T]he medieval canonists integrated various aspects of religious and secular thought to create a natural law theory of marriage. The theory held that marriage was a permanent association between a man and women intended to nourish the bond of conjugal love and to enable the procreation and education of children.

*Id.* See also, Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, 2 U. ST. THOMAS L.J. 5 (2004); Michael J. Perry, *Christians, the Bible and Same-Sex Unions: An Argument for Political Self-Restraint* 36 WAKE FOREST L. REV. 449 (2001). But see, WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 99-100 (1996) (noting that "[t]here is no univocal Judeo-Christian tradition against same-sex marriage" and presenting alternate interpretations of religious texts commonly cited as condemning homosexuality).

may represent either lingering or renewed willingness to embrace legal rules whose justifications lie almost exclusively within that tradition.

The concept of conjugality supports (and has itself been reinforced by) another concept – that of familial privacy. Early U.S. law (and much of contemporary U.S. law) viewed the conjugal couple as an impenetrable and indivisible unit. The metaphor of unity, combined with the concept of the male’s individual rights as head of that unit, shielded the family from state interference. The next Section briefly examines family privacy’s Biblical-natural roots

*c. The Concept of Privacy*

Biblical naturalism also helped shape the concept of family privacy. Post-colonial notions of patriarchal authority over the home justified state noninterference in the family; such noninterference sought not to ensure *individual* autonomy and self-effectuation, but instead to enable the *family* to function as a distinct unit within society, under male authority.<sup>131</sup> Social practice obligated the male head of the family to run a well-ordered household; legal rules empowered him to do so by granting him control over its inhabitants, family property, and other resources.<sup>132</sup> One seventeenth-century author expressed the common authoritarian view of parenting: “[C]hildren’s wills and willfulness [must] be restrained and repressed . . . Children should not know, if it could be kept from them, that they have a will of their own, but in their parent’s keeping.”<sup>133</sup>

(Notably, the concept of familial privacy was simultaneously supported in the early U.S. by the principle of liberal individualism. The next section discusses the nature of its influence, and how liberal-individual ideas on this topic were adjusted to better correspond with Biblical-natural ideals. It will also trace how the expansion of that principle shifted notions of privacy from the family to the individual)

Biblical naturalism and the concepts that embody it have thus exerted great influence over the shape of family law as it existed in the early

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<sup>131</sup> Early Americans viewed the family as the unit entitled to privacy and freedom from state intervention. Larry Peterman & Tiffany Jones, *Defending Family Privacy*, 5 J. L. & FAM. STUD. 71, 74-76 (2003). Peterman and Jones note that the early concept of familial privacy protected the family unit “so that members of the family could fulfill the responsibilities inhering in their particular roles.” *Id.*

<sup>132</sup> MICHAEL GROSSBERG, GOVERNING THE HEARTH 5, 236-38 (1985). Into the nineteenth century, fathers had exclusive and extensive rights over wives and their children, who were subordinate to and dependent on them. See also *supra* notes 124-25, and accompanying text (discussing doctrine of coverture); note 24, and accompanying text (discussing other doctrines).

<sup>133</sup> Teitelbaum, *supra* note 40, at 1139 (quoting J. ROBINSON, OF CHILDREN AND THEIR EDUCATION (1628) (additional citations omitted)).

states. Early lawmakers shared the near-universal belief in a theistically ordained natural order, distinctly shaped by the Biblical tradition. In many ways, however, its directives conflicted with those of a second principle to which the early U.S. was also committed – liberal individualism. The ideal of liberal individualism, how it clashed with early Americans’ Biblical naturalistic beliefs, and the effects of these on our family law are the focus of the following Section.

*B. LIBERAL INDIVIDUALISM AND ITS INFLUENCE ON U.S. FAMILY LAW*

As it is with Biblical naturalism, that the principle of liberal individualism has helped shape U.S. family law is clear.<sup>134</sup> Ideals of individual liberty were written into the country’s founding documents and are part of our cultural discourse.<sup>135</sup> This Article argues that this is the second foundational principle of U.S. family law – like Biblical naturalism, it has heavily influenced the original shape and later development. Its ideals have moved U.S. family law along two axes: the first has extended guarantees of liberty to greater numbers and classes of individuals, including women and children; the second has increased the total quantum of liberty permitted each individual. Changes in laws have sought to expand individual autonomy and facilitate self-determination, frequently at the expense of Biblical-natural ideals.

The next two sections describe the principle of liberal individualism and demonstrate its influence on concepts and practices of U.S. family law.

*1. Liberal Individualism*

The liberal theories articulated by John Locke significantly influenced American statesmen of the late eighteenth century,<sup>136</sup> and his ideas have

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<sup>134</sup> See Singer, *supra* note 31, at 1508-1517 (1992) (noting the importance on U.S. political and legal thought of individual autonomy and notions of privacy, but arguing that until recently, these concepts have been ascribed to the family unit, rather than the individual). See generally, ROBERT BELLAH, ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985).

<sup>135</sup> See THE DECLARATION OF INDEPENDENCE paras. 1-2 (U.S. 1776); U.S. CONST. pmb. See also *infra* note 138 and accompanying text.

<sup>136</sup> E.g., LAURENCE H. TRIBE AND MICHAEL C. DORF, ON READING THE CONSTITUTION 70-71 (1991) (“[O]ne of the most influential thinkers for American statesmen of the [late eighteenth century was] the seventeenth-century English political philosopher John Locke.”); Steven Kautz, *Liberty, Justice, and the Rule of Law*, 11 YALE J.L. & HUMAN. 435, 438, n.7. (1999) (“Classical liberalism is the view that liberty is the fundamental political good. The authoritative statement of this view is JOHN LOCKE, TWO TREATISES OF GOVERNMENT); Jeremy Waldron, *Natural Rights in the Seventeenth and*

been considered “the touchstone of all subsequent liberal thought.”<sup>137</sup> Locke’s theory of liberal democracy espouses radical individualism<sup>138</sup> and a concomitant theory of the negative, limited state.<sup>139</sup> Thomas Paine’s

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*Eighteenth Centuries, in* NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN (Jeremy Waldron, ed., 1987) 7-25 (“[T]he argument set out in [Locke’s] *Two Treatises of Government* will serve us, as it served the revolutionaries of the eighteenth century, as the paradigm of a theory of natural rights.”); Bruce Kuklick, *Seven Thinkers and How They Grew: Descartes, Spinoza, Leibniz; Locke, Berkeley, Hume; Kant, in* PHILOSOPHY IN HISTORY 130 (Richard Rorty, et al., eds., 1984) (“[I]n the United States, [Locke] was the intellectual father of the Constitution. He was ‘America’s philosopher’, ‘the great and celebrated Mr. Locke’, whose claim on American affections dated from the Revolution.”).

<sup>137</sup> BRIAN R. NELSON, *WESTERN POLITICAL THOUGHT: FROM SOCRATES TO THE AGE OF IDEOLOGY* 208 (2d ed. 1996). Other liberal thinkers who influenced early Americans included Thomas Hobbes, Jean-Jacques Rousseau, and Immanuel Kant. *Id.* Mary Ann Glendon points especially to Thomas Hobbes, especially as his ideas were expressed by the influential American jurist Oliver Wendell Holmes, Jr. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 119-25 (1987). Hobbes’s writings influenced Locke; however, Locke’s conception of the natural state as one of liberty triumphed over the Hobbesian view of the state of nature as a state of war. *See* NELSON, *supra*, at 233-34.

<sup>138</sup> In his *Second Treatise*, Locke writes that “[m]an being born . . . with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of Nature, equally with any other man . . . have by nature a power . . . to preserve his property—that is, his life, liberty, and estate, against the injuries and attempts of other men”. JOHN LOCKE, *The Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* Bk. II, cap. 7 (Peter Laslett, ed. Cambridge: Cambridge University Press 1965) (1689).

<sup>139</sup> NELSON, *supra* note 137, at 193-95. Locke emphasized the primacy of individual rights and liberties, and viewed the function of government to be limited to safeguarding those liberties from intrusion. He writes that

A man, . . . having, in the state of Nature, no arbitrary power over the life, liberty, or possession of another, but only so much as the law of Nature gave him for the preservation of himself and the rest of mankind, this is all he doth, or can give up to the commonwealth, and by it to the legislative power, so that the legislative can have no more than this . . . It is a power that hath no other end but preservation”.

LOCKE, *supra* note 138, at cap. 11.

There has been some debate as to whether the dominant political tradition in the fledgling U.S. was republicanism or the classical liberalism perhaps best articulated by John Locke. *See* Mark V. Tushnet, *Book Review, A Conservative Defense of Liberal Constitutional Law*, 100 HARV. L. REV. 423, 425 (1986) (reviewing ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* (1985)). The traditions differ in their conceptions of individual liberty: in the republican ideal, liberty is the absence of domination; in the Lockean ideal, liberty is the absence of interference. *See* PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 41 (1997). In the republican view, “[T]he kindly master does deprive subjects of their freedom, dominating them

*Common Sense*, a highly influential 1776 pamphlet that stated the case for American independence, echoes Locke's theory of limited government as one charged with the protection of certain fundamental rights; these included life, liberty, and property.<sup>140</sup> Other statesmen, including Alexander Hamilton and James Otis, explicitly refer in their writings to the importance of Locke's theories.<sup>141</sup> While many early Americans undoubtedly learned only second-hand Lockean liberal ideals (dissociated, perhaps, even from his name), those ideals nonetheless predominated. As one political theorist argues:

The American Revolution was carried out, if only indirectly, in the name of Lockean ideals. The *Declaration of Independence* . . .

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without actually interfering. The well-ordered law does not deprive subjects of their freedom, interfering with those subjects but not dominating them." *Id.* There appears to be general consensus, however, that Lockean liberal individualism prevailed as the dominant political philosophy, and the notion of freedom as non-interference superceded the notion of freedom as non-domination. *See id.*, at 41. Pettit argues that the republican ideal was gradually replaced by the liberal, non-interference ideal. *Id.* at 12, 35-50.

Until the latter half of the twentieth century, historians accepted that the "American political tradition was unequivocally Lockean." *Id.* (citing as the classic articulation of this view the discussion in L. HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955)). Other historians have argued that, at least during the period leading up to the framing of the Constitution (and perhaps for some time thereafter), the predominant political philosophy was republican. *See, e.g.*, G. WILLS, *EXPLAINING AMERICA: THE FEDERALIST* (1981); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787* (1969). This view, however, has not gained universal acceptance. *See, e.g.*, J. DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS* (1984).

<sup>140</sup> THOMAS PAINE, *COMMON SENSE: ON THE ORIGIN AND DESIGN OF GOVERNMENT IN GENERAL, WITH CONCISE REMARKS ON THE ENGLISH CONSTITUTION* (1776) ("Society is produced by our wants, and government by our wickedness; the former promotes our happiness *positively* by uniting our affections, the latter *negatively* by restraining our vices . . . Government, even in its best state, is but a necessary evil")., *reprinted in* *THE PHILOSOPHY OF FREEDOM: IDEOLOGICAL ORIGINS OF THE BILL OF RIGHTS 171-79* (Samuel B. Rudolph, ed. 1993). *See also*, J.S. MCLELLAND, *A HISTORY OF WESTERN POLITICAL THOUGHT* (1996); *THE PHILOSOPHY OF FREEDOM*, *supra* at 87. McLelland notes that:

According to the testimony of contemporaries, Paine's pamphlet had a remarkable effect on the minds of Americans in the year 1776 when even the most rebellious Americans were still wavering about the crucial step of declaring independence. George Washington himself is supposed to have been finally converted to independence by reading Paine.

*Id.*

<sup>141</sup> Alexander Hamilton, *Response to "Farmer"*, in *THE PAPERS OF ALEXANDER HAMILTON, VOL. 1* (Harold C. Syrett and Jacob E. Cooke, eds, Columbia University Press 1961); James Otis, *Of the Natural Rights of Colonists*, *reprinted in* *THE PHILOSOPHY OF FREEDOM: IDEOLOGICAL ORIGINS OF THE BILL OF RIGHTS 129-31* (Samuel B. Rudolph, ed. 1993).

.speaks the language of natural rights . . . Locke’s economic and social theories have by now become an American ideology. His emphasis upon the importance of . . . individual rights has been profoundly influential in this country.”<sup>142</sup>

Also profoundly influential in the eighteenth century was the principle of Biblical naturalism. It too shaped political thought and legal practice, and early Americans sought to reconcile the two principles and accommodate both in law. Locke himself provides a striking example.

Locke hewed to a view of natural law that grounded his theory of rights and equality.<sup>143</sup> And the ideas expounded in his *Two Treatises* are, according to commentator John Dunn, “saturated with Christian assumptions”.<sup>144</sup> Locke took the general subordination of women as evidence of its natural ordination. As did many early Americans, he viewed entry into marriage as properly governed by the liberal concept of contract, describing it as a “voluntary Compact between Man and Woman”.<sup>145</sup> Locke nonetheless did not extend his notion of equality to women within marriages, reasoning that when husband and wife disagree, it becomes “necessary, that the last Determination, *i.e.*, the Rule, should be placed somewhere, [and] it naturally falls to the Man’s share, as the abler and the stronger.”<sup>146</sup>

Thus Locke, who convincingly argued for the safeguarding of individual liberty, was at the same time strongly constrained and deeply conflicted by Biblical tenets that reinforced the moral rectitude of the “natural” patriarchal family. After attempting in vain to reconcile Locke’s position on women’s subjection with his theories of basic human liberty and equality, Jeremy Waldron concludes:

Locke’s position on the natural subjection of wives *is* an embarrassment for his general theory of equality . . . Bible and nature are cited for the

<sup>142</sup> NELSON, *supra* note 137, at 212.

<sup>143</sup> LOCKE, *supra* note 138, at 311. “The *State of Nature* has a Law of Nature to govern it, which obliges every one: and Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.” *Id.* His was a view widely held by Americans. See, e.g., THE PHILOSOPHY OF FREEDOM: IDEOLOGICAL ORIGINS OF THE BILL OF RIGHTS 84-85 (Samuel B. Rudolph, ed. 1993) (“The early Americans talked a good deal about what we would today refer to as natural law . . . The laws of God and nature [ ] afford an equality of liberty for all”).

<sup>144</sup> JOHN DUNN, THE POLITICAL THOUGHT OF JOHN LOCKE: AN HISTORICAL ACCOUNT OF THE ARGUMENT OF THE TWO TREATISES OF GOVERNMENT 99 (1969). Dunn writes that “Jesus Christ (and Saint Paul) may not appear in person in the text of the *Two Treatises* but their presence can hardly be missed when we come upon the normative creaturely equality of all men in virtue of their shared species-membership.” *Id.*

<sup>145</sup> LOCKE, *supra* note 138, at 82.

<sup>146</sup> *Id.*

proposition that women are men's inferiors; and Bible and nature are cited for the proposition that women and men are one another's equals . . . [H]ere is a philosopher struggling *not altogether successfully* to free his own thought as well as the thought of his contemporaries from the idea that something as striking as the difference between the sexes must count in itself as a refutation of basic equality".<sup>147</sup>

The difficulties of accommodating in public policy both the ideal of liberal individualism and Biblical natural views of family were evident in early political debates. Delegates to the 1853 Massachusetts constitutional convention, for example, viewed as critical the need to safeguard individual rights through democratic political representation.<sup>148</sup> One delegate noted that, "[I]n order to secure the rights of these families – these units, including all the individuals in them . . . each family must be represented."<sup>149</sup> But, he rationalized, the male head of household must be that sole representative because the differences among the sexes was natural and ordained by God.

This Article does not suggest that early American lawmakers were intimately familiar with and/or influenced by all aspects of Lockean thought. Nor does it minimize the likely influence of other political theorists. Yet as a political philosophy, liberalism was foundational. Its ideas informed early Americans' thinking and writings; the latter were distributed and widely read. The tension between ideals of liberty and equality and the realities of social inequalities was one with which Locke himself grappled, largely unsuccessfully. Over the next two centuries, many of the changes in U.S. family laws sought to more closely align social practice with liberal ideals.

The next section turns to the influence of liberal individualism on U.S. family law and practice.

## 2. *Its Influence on U.S. Family Law*

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<sup>147</sup> JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS OF JOHN LOCKE'S POLITICAL THOUGHT 40 (2002) [emphasis in original] (discussing the *Two Treatises* and JOHN LOCKE, THE REASONABLENESS OF CHRISTIANITY, AS DELIVERED IN THE SCRIPTURES (Bristol: Thoemmes Press, 1997).

<sup>148</sup> Jacob Katz Cogan, Note, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 YALE L.J. 473, 485 (1997), citing 1 Official Report of the Debates and Proceedings in the State Convention, Assembled May 4, 1853, To Revise and Amend the Constitution of the Commonwealth of Massachusetts 747 (Boston, White & Potter 1853) [hereinafter Massachusetts Convention of 1853] (statement of Abijah Marvin).

<sup>149</sup> *Id.*, at 485, citing Massachusetts Convention of 1853 at 747 (statement of Abijah Marvin). Another delegate argued that a family could "have but one will; and the man, who, by nature, is placed at the head of that government, is the only authorized exponent of that will." Massachusetts Convention of 1853 at 598 (statement of George Boutwell).

The principle of liberal individualism has guided the direction of U.S. family law. Many developments in family laws reflect its direct influence. To give just a few examples, rules have: restored legal capacity and citizenship to married women;<sup>150</sup> eased restrictions on divorce;<sup>151</sup> and relaxed legal constraints on sexual and intimate conduct generally.<sup>152</sup> Liberal ideals have also expanded society's willingness to view children, not exclusively or even primarily as subordinate to parental authority, but as individuals in their own right.<sup>153</sup>

Liberal individualism is also embodied in the following concepts: freedom from state interference, or privacy; freedom to enter into contracts; and, through the concept of *parens patriae*, the freedom (usually of children) from harm imposed by others. The next Sections detail the manner in which these important concepts in our family law embody the liberal individual principle.

*a. The Concept of Privacy*

The principles of Biblical naturalism and liberal individualism together gave shape to and were reflected in the early concept of familial privacy. Biblical naturalism grounded the concept in patriarchal norms, and these were embodied in rules that reinforced paternal authority.<sup>154</sup> But liberal individualism also figured in the concept. And in liberal rhetoric, family privacy protected from undue state interference the individual rights of the husband/father as the head and public representative of his family.<sup>155</sup>

Early law uneasily reconciled ideals of liberty and equality with the social reality of inequality by identifying white, male property-owners as those individuals uniquely entitled to full citizenship and its attendant rights.<sup>156</sup> A man's liberty included control over his property and

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<sup>150</sup> See *supra* note 124, and accompanying text.

<sup>151</sup> See *supra* note 24, and accompanying text.

<sup>152</sup> See *supra* note 25, and accompanying text.

<sup>153</sup> See Michael D.A. Freeman, *Taking Children's Rights More Seriously*, in CHILDREN, RIGHTS AND THE LAW 52-71 (Alston, *et al.*, eds. 1992).

<sup>154</sup> See *supra* notes 131-33, and accompanying text.

<sup>155</sup> See *supra* notes 143-49, and accompanying text.

<sup>156</sup> A married man became the political and legal representative of his wife, and assumed her property – “[h]e became the one *full* citizen in the household, his authority over and responsibility for his dependents contributing to his citizenship capacity.” COTT, *supra* note 87, at 11-12 (2000). See also, CHILTON WILLIAMSON, *AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY, 1760-1860* (1960); MARCHETTE CHUTE, *THE FIRST LIBERTY: A HISTORY OF THE RIGHT TO VOTE IN AMERICA, 1619-1850* (1969); NELSON, *supra* note 137, at 193-95. Nelson notes that Locke considered women “citizens” who were nonetheless excluded from full citizenship on the basis of paternal/patriarchal power (which he rejected as a legitimate form of political authority). According

household.<sup>157</sup> The state respected that liberty and hence accorded the family privacy, intervening only minimally. The tradition of state non-interference in the family gave a man near-absolute control over his home and the individuals in it – it was his own “little commonwealth.”<sup>158</sup> This carefully-circumscribed conception of liberal individualism helped secure men’s individual rights while simultaneously respecting Biblical-natural norms dictating paternal authority over the family.<sup>159</sup>

Society’s stated liberal ideals were plainly inconsistent with the legal incapacities and social inequalities of certain classes of people, including women and enslaved people. Gradually, other individuals within the household – women, children, and slaves gained full (or near-full) formal legal personhood, entitling them to share the rights previously enjoyed only by certain men.<sup>160</sup> Women gradually gained formal equality and marriage officially became a relationship between equals.<sup>161</sup> The presence in the household of additional full citizens thus weakened the concept of male-headed familial privacy, but by no means did it eradicate altogether the concept of family privacy.<sup>162</sup>

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to Nelson, “[t]his was possible only on the assumption that the patriarchal family is natural, that it existed even in the state of nature, and that as a consequence women never possessed that property in either person or possessions that would have made them equal participants with men in the act of contracting.” *Id.* at 215.

<sup>157</sup> The husband’s control over the marital property was absolute, and his authority over both his wife and children were extensive. *See generally* KATZ, *supra* note 8; GROSSBERG, *supra* note 132, at 5.

<sup>158</sup> *See* JOHN DEMOS, *A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY*, p. x. (1970); GROSSBERG, *supra* note 132, at 4-5.

<sup>159</sup> Teitelbaum, *supra* note 40, at 1174-79 (explaining that the law’s emphasis on family privacy and autonomy reinforced male authority over the family). *See also*, KATZ, *supra* note 8, at 131, *citing* Sanford N. Katz & William A. Schroeder, *Disobeying a Father’s Voice: A Comment on Commonwealth v. Brasher*, 57 MASS. L.Q. 43 (1973).

<sup>160</sup> Within family law, the enactment of Married Women’s Property Acts restored to married women their legal personalities. *See* BASCH, *supra* note 87. Other significant rights became incorporated in Amendments to the Constitution. For example, women gained the absolute right to vote in 1920. U.S. CONST. amend. XIX. The Fourteenth Amendment more broadly guarantees liberty and equal protection of the laws. U.S. CONST. amend. XIV, § 1.

<sup>161</sup> Ann Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1830 (1995).

<sup>162</sup> *Id.* at 1826-36. Dailey notes that “[t]he expansion of individual rights within the domestic sphere, however, has not entirely eradicated the rhetoric of family privacy from legal discourse. The doctrine of family privacy . . . continues to control the state’s ability to intervene in the parent-child relationship”. *Id.* at 1830-31.

The privacy that once respected male authority, however, continued to exist, and shielded from public view domestic violence and subordination of physically and economically weaker wives, as well as physical abuse of children. Thus

Family privacy – modified by gains in gender equality – remains especially robust in the area of parent-child relationships.<sup>163</sup> Notions of privacy that earlier limited the state’s interference with a man’s absolute authority over his wife, children, and household became officially gender-neutral. Men no longer have formal power over their wives, but parents continue to have power over their children – “paternal authority” has become “parental authority”. Indeed, the U.S. Supreme Court in the early twentieth century explicitly grounded in principles of individual liberty a constitutionally-protected “parental right” in the care and control over one’s child.<sup>164</sup> Family privacy thus respects “the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>165</sup>

In the twentieth century, the concept of privacy that had earlier protected the family shifted to protect the individual. In 1973, the Supreme Court in *Eisenstadt v. Baird* extended the protections of privacy – initially belonging to the marital family – to the individual.<sup>166</sup> With this decision, the Court severed the theoretical link of privacy from its Biblical underpinnings and firmly anchored it exclusively in Constitutional ideals of individual liberty. Privacy exists now as a fundamental right belonging to individuals. The ideal of state noninterference in private decisions (procreative decisions,<sup>167</sup> intimate sexual acts,<sup>168</sup> etc.) has been grounded in the Constitution’s Due Process Clauses, the 9<sup>th</sup> Amendment, and penumbra of various other amendments to the Constitution. It is worth noting, however, that the concept of privacy itself may be ceding ground

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feminists have criticized the concept of privacy as one that has permitted the continued isolation and domination of women in homes.

<sup>163</sup> Lee Teitelbaum notes that “[t]he notion of family privacy or family autonomy is [ ] invoked regularly in connection with parent-child relations.” Teitelbaum, *supra* note 40, at 1146.

<sup>164</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). DAVID J. HERRING, *THE PUBLIC FAMILY: EXPLORING ITS ROLE IN DEMOCRATIC SOCIETY* 139-58 (2003). “Parental rights” include the presumptive right to the custody of the child; to decide the nature and duration of their children’s education; to leave their children in the care of another person for long periods of time and subsequently reclaim them; and to discipline the child, including corporal punishment or emotional manipulation. *Id.* at 140.

<sup>165</sup> *Pierce v. Society of Sisters*, 268 U.S. at 534-35. Ann Dailey notes that the Court has sought to justify parental rights (within a constitutional philosophy that places great emphasis on individual autonomy) by pointing to the unique role of parents in preparing their children for the responsibilities of citizenship. Dailey, *supra* note 161, at 1832-33.

<sup>166</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>167</sup> *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

<sup>168</sup> In *Lawrence*, the Court saw these laws as seeking to control, not merely a specific act, but more broadly “a personal relationship that . . . is within the liberty of persons to choose.” S. Ct. 2472, 2478 (2003).

to the broader notion of liberty (with its more explicit Constitutional grounding) as the justification for individual protections.<sup>169</sup>

*b. The Concept of State as Parens Patriae*

The principle of liberal individualism, counterintuitively perhaps, has helped to expand notions of children's distinct personhood and shape the concept of *parens patriae*. It has been the impetus behind, and provides justification for, extension of notions of full personhood to children as a class. The past few decades have seen development in the area of children's individual rights, but children's rights have in many respects been viewed as secondary to parents' rights.<sup>170</sup>

Critics of the parental rights doctrine have argued that it conflicts with liberal ideals – creating or expanding parental rights necessarily restricts the rights of children. They argue that a strong conception of parental rights subjects children to the choices of another, subsumes their interests within those of their parents, and fails to recognize that children's and parents' interests can all-too-easily diverge.<sup>171</sup> Parents' rights include their ability to make choices for their children (religion, education, etc.) that can sharply limit their future abilities to choose their own life course.

To protect the individual rights of children, the state is increasingly willing to use the doctrine of *parens patriae* to intervene in even the intact family.<sup>172</sup> Historically the state exercised its *parens patriae* power when no guardian was available to a child.<sup>173</sup> That power has gradually expanded. In the nineteenth century, state legislatures began enacting child abuse and neglect laws that authorized governmental intervention

<sup>169</sup> See *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992) (discussing a woman's liberty interests in choosing whether to bear a child).

<sup>170</sup> See *supra* notes 45-55 and accompanying text. See also, HERRING, *supra* note 164, at 139-58, Freeman, *Taking Children's Rights More Seriously*, *supra* note 153, at 52-71.

<sup>171</sup> See, e.g., AMY GUTMANN, *DEMOCRATIC EDUCATION* (1987); Dailey, *supra* note 161, at 1831-33; Barbara Bennett Woodhouse, *Who Owns the Child: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

<sup>172</sup> HERRING, *supra* note 164, at 159. Herring notes that, "[W]hile the rhetoric of parental rights comes under attack because of its negative effects on children and functioning family associations, the rhetoric of children's rights grows more robust . . . In essence, society has used the rhetoric of children's rights to justify government involvement in the family association." *Id.* (citations omitted).

<sup>173</sup> See Natalie Loder Clark, *Parens Patriae: History and Present Status of State Intervention into the Parent-Child Relationship*, in 1A CURRENT PERSPECTIVES IN PSYCHOLOGICAL, LEGAL AND ETHICAL ISSUES 109, 119 at 109-10, 116 (Sandra Anderson Garcia & Robert Batey eds, 1991).

into abusive parent-child relationships.<sup>174</sup> And today, laws give states even broader powers to protect children.<sup>175</sup> States assert jurisdiction in the name of children's best interest in actions before separate juvenile courts, as well as in custody and adoption actions (including, perhaps most notoriously, allegations of child abuse and neglect).<sup>176</sup>

The state's interfering when necessary to safeguard the liberty of some (*i.e.*, children) from harmful incursion by others (*e.g.*, parents or guardians), is arguably the very embodiment of the Lockean ideals of government.

*c. The Concept of Contract*

An essential aspect of liberty is the freedom to contract. Both liberal individualism and Biblical naturalism supported the concept of conjugality as a relationship entered into *voluntarily*.<sup>177</sup> That women freely sought and accepted the protection of a spouse gave early Americans some cover for the internal inequalities of the marital relationship.<sup>178</sup>

The notion of indissoluble marriage clashed with liberal ideals.<sup>179</sup> States drastically lowered barriers to divorce, in part reasoning that

<sup>174</sup> KATZ, *supra* note 8, at 131. *See generally*, SANFORD N. KATZ, MELBA MCGRATH & RUTH-ARLENE W. HOWE, CHILD NEGLECT LAWS IN AMERICA (American Bar Assn. Press, 1976).

<sup>175</sup> For a discussion of the current contours of the doctrine of *parens patriae* in the U.S., *see* Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381, 403-14 [hereinafter Clark, *Parens Patriae and a Modest Proposal*].

<sup>176</sup> *See* Clark, *Parens Patriae and a Modest Proposal*, *supra* note 175, at 403-14, n. 17.

<sup>177</sup> *See* Cogan, *supra* note 148, at 485. One nineteenth-century writer noted that married women "conferred upon their husbands, by the marriage contract, all their civil rights: not absolutely, . . . but on condition, that the husband will make use of his power to promote their happiness". *Id.*, *citing* WILLIAM C. JARVIS, THE REPUBLICAN; OR, A SERIES OF ESSAYS ON THE PRINCIPLES AND POLICY OF FREE STATES, HAVING A PARTICULAR REFERENCE TO THE UNITED STATES OF AMERICA AND THE INDIVIDUAL STATES 66 (Pittsfield, Phineas Allen 1820).

<sup>178</sup> *See supra* notes 145-46, and accompanying text.

<sup>179</sup> ARLAND THORNTON, READING HISTORY SIDEWAYS: THE FALLACY AND ENDURING IMPACT OF THE DEVELOPMENTAL PARADIGM ON FAMILY LIFE 168 (2005). Thornton argues the incompatibility of enforced lifelong marriage with Lockean liberal ideals:

That marriage was indissoluble had been a central [tenet] of the Catholic Church from about 1200 on. With the Protestant Reformation came the acceptance of divorce, but only in very limited sets of circumstances. Marriage continued to be viewed legally, socially, and religiously as a lifetime commitment. Clearly, Lockean principles were fundamentally at odds with the notion of indissoluble marriage.

voluntariness was an essential aspect of the marital “contract”. Initially, divorce proceedings permitted courts to inquire into details of the failed marriage; with the adoption of no-fault provisions in divorce statutes, the necessity of such inquiries has been drastically curtailed. The state thus continues to oversee dissolution of the marital bond. But the gradual relaxing of divorce laws means that the formal strictures of the marital status have ceded ground to individualism and the right to self-determination. The conjugal unit is sufficiently important that state doesn’t want it severed lightly; but the countervailing principle of liberal individualism also requires that state not stand in the way of its citizens’ desire for freedom and self-determination.

Couples have limited freedom to alter by contract some of the default rules that govern the terms of their marriage, because strong conjugal norms sharply circumscribe this ability.<sup>180</sup> They have more freedom, however, to alter by contract the financial consequences attendant to the dissolution of their marriage.<sup>181</sup> Even these contracts, however, are frequently closely examined by courts to ensure that their enforcement would not offend public policy.<sup>182</sup>

### III. EVALUATING THE PRINCIPLES

“[A] commitment to the *revisability* of all beliefs is (if anything is) the hallmark of the pragmatic attitude.”<sup>183</sup>

This Article tackles the first part of a larger project – development of a normative jurisprudence of U.S. family law. This larger project comprises three sequential parts: First, it requires a conceptual analysis of the social and legal practices that govern families. Parts I and II have done this. The goal of this type of analysis is to expose the structure of family law. Understanding its structure helps us think more clearly about what U.S. family law *is*, in order better to subject that *is* to analysis.<sup>184</sup> Second, the larger project requires critical or evaluative analysis of family law – a task

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*Id.*

<sup>180</sup> See *supra* notes 43-44, and accompanying text (discussing Uniform Premarital Agreement Act and states’ treatment of premarital agreements generally).

<sup>181</sup> See *id.*

<sup>182</sup> See, *supra* notes 43-45, and accompanying text. See also, e.g., WIS. STAT. § 767.255(3) ([N]o such [premarital] agreement shall be binding where the terms of the agreement are inequitable as to either party.”). See also, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 7.08 (2002) (seeking to systematize heightened judicial scrutiny of premarital agreements). The Uniform Premarital Agreement Act treats premarital agreements more like commercial contracts, although approximately one-third of the states have altered its terms to require heightened scrutiny.

<sup>183</sup> COLEMAN, *supra* note 5, at 8 [emphasis in original].

<sup>184</sup> See COLEMAN, *supra* note 5, at 12.

made more manageable through our deepened understanding of its structure. This Part undertakes that task, examining family law's most significant rules as expressions of interrelated concepts and underlying principles. The third and final part of the project will offer a normative jurisprudence of U.S. family law that will better reflect contemporary social values and whose outcomes will better meet contemporary social needs. That difficult and important task must be the focus of future work.

This Article turns now to the focus of this part – evaluating family law as the expression of its principles. This evaluation asks whether its principles are satisfactory, or as reasonably satisfactory as can be expected. This Article suggests one way to approach this difficult question. If we cannot answer yes to it – and the next two sections conclude that we cannot – then we must undertake the final step of revising them.

To objectively evaluate the principles is, to say the least, difficult. By shaping our family laws and social experience, the principles have themselves affected, if not largely determined, many of our beliefs and values about families. The challenge, then, is to avoid evaluating the principles merely by reference to our moral sensibilities, as shaped by the principles themselves. That would, of course, be a circular and pointless exercise. To avoid that outcome, we can focus on the principles exclusively as they figure in family law,<sup>185</sup> yet allow our broader range of understanding and experience enter into and inform our evaluation. That broader experience, by incorporating a full range of principles (and hierarchies of principles), helps ensure that we do not merely examine the principles by reference to themselves or in an analytical vacuum.

Good or useful principles, this Article posits, would share at least the following attributes: First, they would function well. In other words, their expression in law and practice would further a set of social goals we identify as useful and productive (*e.g.*, provision of care for society's dependent members), while avoiding, as much as possible, outcomes that we determine to be harmful and destructive (*e.g.*, impoverishment of those members). And second, they would work in concert with a full hierarchy of principles from other legal and social contexts that, through our broader social experience, we have come to embrace.

The next Section evaluates each principle separately, examining its inherent attractiveness as well as its practical effect. The final one evaluates them jointly, examining their combined effect on our family laws.

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<sup>185</sup> The principles figure in other aspects of U.S. law and practice; but their desirability as underlying principles in other contexts does not concern us here. Certain principles may properly be foundational in one context but inappropriate in another. This Article thus examines their desirability as they apply to the law of families.

## PRINCIPLES OF U.S. FAMILY LAW

### A. *THE PRINCIPLES, INDIVIDUALLY*

It is unsurprising that Biblical naturalism and liberal individualism have become the dual foundations of U.S. family law. The conjugal family form fulfills many opposite-sex couples, and at its best provides a stable environment for procreation and childrearing. And most people highly value their autonomy and the safeguards that permit self-determination. But a marriage dissolution rate that nears fifty percent and steadily-increasing numbers of nonmarital families should convincingly demonstrate that traditional lifelong conjugality cannot work for everyone – or even, perhaps, for the majority of us. And while many of us enjoy significant freedom from state interference, many others find themselves without social connection or the social supports that would enable true exercise and enjoyment of liberty. So what precisely is wrong with our principles? Let's turn first to Biblical naturalism.

From Biblical naturalism we derive concepts of conjugality and family privacy. These concepts help define the normative family. The grounding of the normative family in Biblical tradition lends divine sanction and purported moral superiority to that family form, even today. And that normative vision has in turn been expressed most significantly in our laws of marriage and parenting. The principle is thus actualized by family laws that provide societal support and reinforcement to that family form, privileging it.<sup>186</sup>

So how do this principle and the laws that express it function? Again, legal and social practice reinforce and privilege the marital family. That family form aims to provide individual fulfillment (through shared love and commitment) and the publicly-useful work of mutual support and dependent caretaking. But privileging some families necessarily means not privileging others. Thus nonmarital families – even those whose members perform some of the same valuable societal functions (*e.g.*, mutual support, dependent caretaking, and child-raising) as those performed by the members of the marital nuclear family – receive less public support.

Most would agree that (because of shared commitments to another principle – the right to treatment as equals<sup>187</sup>) unequal treatment should exist only with justification. In order to justify conjugal privileging, it should be demonstrated that – at a minimum – the marital family performs some useful societal function that other groupings fail to perform. This

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<sup>186</sup> See *supra* notes 20 and 56, and accompanying text. For additional discussions of the mechanisms through which marital nuclear families have received public support throughout U.S. history, see STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 680-91 (1992); Martha Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2205-06 (1995).

<sup>187</sup> See DWORKIN, *supra* note \_\_\_\_\_ at 272-75.

cannot easily be demonstrated. Indeed, while marriage may provide individual fulfillment to some,<sup>188</sup> the socially useful functions which it performs – mutual support and dependent caretaking – can be and are similarly performed (albeit currently with less social support) by other family groupings.<sup>189</sup> But the power of the conjugal norm is such that even when empirical evidence shows that, in nonconforming relationships, care between adult partners and success of childrearing virtually mirror that of the traditional relationship,<sup>190</sup> the nonconforming ones continue to be viewed as less moral (at best).

An evaluation of the Biblical-natural principle should also examine whether it (again, as expressed through practice) is consistent with the other principle of family law, and the broader hierarchy of principles that we espouse.

Biblical-natural concepts of conjugality and family privacy espouse commitment and unity – laudable goals. But importantly, Biblical naturalism irrevocably ties these values to a single family form – the opposite-sex, formally married couple and their children (or at least, their procreative potential). This is its fundamental flaw. It has led to rules in U.S. family law that elevate family form over family function. The reification of a single family form obscures consideration and support of societal functions performed by nonconforming families.<sup>191</sup> It provides

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<sup>188</sup> In that personal fulfillment through entry into marriage is a good, it is arguably an individual, private good. The sense in which marriage is individually fulfilling and desirable (at least partly) due to the public approbation and support it brings merely emphasizes the need to justify the exclusion of nonconforming groupings from participation. For an elaboration of the argument that marriage's expressive, companionate, and procreative functions are private goods best left to private ordering but that support and dependant caretaking are public functions that should receive public support regardless of family form, *see generally*, Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307 (2004).

<sup>189</sup> One result is the continued success of the marital family relative to nonmarital families. Hence the Biblical naturalistic compulsion is perpetuated, and the continued relative success of the *is* helps justify and perpetuate the *ought*.

<sup>190</sup> *See* Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOCIOLOGICAL REV. 159 (2001).

<sup>191</sup> Indeed, society's refusal to permit nonmarital families the same abilities undermines their ability to perform socially useful functions. In many gay families, only one member may legally adopt a child being raised by both. The other member risks losing all rights to and authority over the child should the couple's relationship fail (a protection afforded both natural and adoptive parents), and the child risks losing benefits derived from its relationship with the non-adoptive parent. *See, e.g.*, HERRING, *supra* note 164, at 156-57; Devjani Mishra, *The Road to Concord: Resolving the Conflict of Law Over Adoption by Gays and Lesbians*, 30 COLUM. J.L. & SOC. PROBS 91 (1996).

unsatisfactory justifications for withholding from those families public benefits afforded the conjugal family.<sup>192</sup>

Lawmaking whose aim is to preserve or promote the conjugal family thus fails to further the social goals of a changing and pluralistic society in many ways. First, lifelong marriage will not be a reality for most families. Second, encouraging couples to procreate to ensure the continued survival or well-being of society is not the imperative it was in the days of the Old Testament – to the contrary. And Biblical naturalism leads to some socially harmful outcomes, as it results in the unequal treatment of significant members of society.

Lawmaking in this tradition imposes conformity with a normative family form with inadequate justification. To state the obvious, we are a pluralistic society whose members do not all espouse the Judeo-Christian tradition and the moral values it includes.

Indeed, the dominance of the majority will (manifested by social and legal preferences for the Biblical-natural normative family) that grants lesser liberty to a nonconforming minority represents just the sort of conformity against which the principle of liberal individualism ultimately rails. Let's turn now to it.

On the positive side of the ledger, liberal individualism aims to promote autonomy and resists majority efforts to impose conformity. The principle has historically been invoked to increase the liberty of individuals within the conjugal family. It has guided society's increasing respect of the liberty and equal treatment of both women and children.<sup>193</sup> It is now being invoked by those who seek to increase the liberty of individuals outside of the conjugal family (*i.e.*, those families that don't conform to the traditional marital norm – including same-sex families) and are thus denied its benefits.

But acceptance of liberal individualism as an ideal is neither universal nor unequivocal. Theorists have critiqued its adoption a political goal. As early as the nineteenth century, De Tocqueville argued that liberal individualism emphasizes self-interest at the expense of community life. The liberal individual “exists but in himself and for himself . . . [A]s for the rest of his fellow citizens, he is close to them, but he sees them not”.<sup>194</sup>

<sup>192</sup> See generally, Hamilton, *supra* note 188.

<sup>193</sup> See *supra* notes 160-62 (discussing expansion of women's rights), 170-76 (discussing expansion of children's rights) and accompanying text.

<sup>194</sup> ALEXIS DE TOCQUEVILLE, *THE OLD REGIME AND THE FRENCH REVOLUTION* p. xiii. (Stuart Gilbert trans., Doubleday 1955). De Tocqueville argued that liberal society required a large and powerful central government, which was necessary to ensure maximum and equal liberty to all. The combined effect of individualism and bureaucratic despotism was that “people are far too much disposed to think exclusively of their own interests, to become self-seekers practicing a narrow individualism and caring nothing for the public good. *Id.* For de Tocqueville's prescient critique of liberal democracy generally, see I

Liberal individualism's contemporary critics echo the theme. They argue that its conceptions of autonomy and self-determination protected by legal rights foster individual pursuit of self-interest, detached from consideration for others. Indeed, the focus on individual rights elides civic responsibility and destroys social cohesion.<sup>195</sup>

The flaws of liberal individualism as a founding principle of family law become evident as one examines how, if operating alone, it would find expression in family rules. Within families, dependency and co-dependency are virtually inevitable and can constrain individual fulfillment. Imposing on individuals obligations towards others finds scant support in a liberal-individual theory.<sup>196</sup>

Martha Fineman has further criticized as a fictional construct the concept of the autonomous individual itself.<sup>197</sup> Fineman points out that at some point in life, every individual is dependent on others, and even individuals who appear to be "autonomous" are in many ways supported by others (*e.g.*, the "autonomous" adult male whose market or public activities are made possible by the at-home support of a woman and family association).<sup>198</sup> Fineman argues, the concept of the private family—a unit entitled to both protection from the state and freedom from state intervention—assumes away universal dependency. So while liberal democratic society purports to rest on the autonomous individual, in fact it is the family association that is its supporting unit.

In this case, family law's principles do work in concert to achieve the socially desirable goal of mutual support. But there are many examples where the principles together effect, not coherence, but dissonance. The next section illustrates this.

*B. THE PRINCIPLES, WORKING TOGETHER*

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ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 202 (Francis Bowen, ed., Phillips Bradley, trans, Alfred A. Knopf, Inc. 1945).

<sup>195</sup> See, *e.g.*, MARY ANN GLENDON, *RIGHTS TALK* (1991); MARTHA MINOW, *MAKING ALL THE DIFFERENCE* (1990); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* (1975); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). But see, *e.g.*, Linda C. McClain, "Atomistic Man" Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992) (arguing that contemporary legal liberal theory, as expounded by Ronald Dworkin and John Rawls, cannot be reduced to the view of the atomistic individual, but instead, supports social connection).

<sup>196</sup> See, GLENDON, *RIGHTS TALK*, *supra* note 195, at 76-108. See generally, *supra* note 195, and accompanying text.

<sup>197</sup> Martha Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181 (1995).

<sup>198</sup> *Id.* at 2200. See also, MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 145 (1995).

## PRINCIPLES OF U.S. FAMILY LAW

The existence in a field of law of principles in tension with each other is not inherently objectionable.<sup>199</sup> To the contrary, such tension can lead to productive compromise. And sometimes, in the case of Biblical naturalism and liberal individualism in family law, it does. For instance, liberal ideals have operated to relax some of the more oppressive aspects of the traditional conjugal relationship, expanding the liberties of women and children and lowering barriers to individuals wishing to exit broken relationships. It thus enables marriage (which originated as a patriarchal and oppressive institution) to evolve and thus continue to exist and perform socially useful support and child-raising functions.<sup>200</sup> But in other significant respects, the foundational principles that undergird our family law are irreconcilable. Together, they too-often produce not productive compromise but incoherence and discord. The most significant examples follow, beginning with membership in the gravitational center around which family law revolves – the marital, nuclear, family.

The previous section argued that Biblical naturalism ultimately expresses an ideal that elevates family form over family function, unfairly excluding many families from the institutional benefits afforded marital families. Liberal individualism has been able to operate within the conjugal construct, expanding the liberties of those within it, but not significantly opening its membership to other groups. Some argue that, as it did with divorce, conjugality can adjust to accommodate same-sex couples;<sup>201</sup> but compromise here is proving challenging. As those who would defend marriage did with indissolubility (and then racial purity) in earlier centuries, many today view the opposite-sex requirement as one of the essential terms of the conjugal relationship. A relationship that does not conform to that form is by definition not a conjugal/marital relationship. Hence, those who would maintain the status quo rely heavily on natural law and Biblical theories. Individuals who do not meet the formal pattern (one man, one woman) but seek to formalize their relationships advance numerous arguments. Among them is the argument that the principle of liberal individualism permits them to structure their intimate lives as they see fit and that, by excluding their relationships (which can perform the same socially useful work as is performed by the traditional conjugal relationship) from the benefits accorded marriage, they are made less equal and left with less freedom than is afforded to

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<sup>199</sup> Contract law, for instance, can be seen as a constant compromise between autonomy and state paternalism aimed at protecting people from their bad bargains.

<sup>200</sup> That the institution excludes other family forms that perform the same functions remains, of course, its fundamental flaw. The observation here, however, is simply that the marital family also performs these necessary functions.

<sup>201</sup> No one seriously believes that the two-person limit will be revisited any time soon.

conforming groupings. Giving same-sex couples entry into marriage would further liberal individual principles.<sup>202</sup> To many, however, eliminating the opposite-sex requirement denatures the institution. They can perceive no compromise.

Another area where the coexistence of both principles produces incoherence is the law of parenting, including the doctrine of parental rights, abuse and neglect laws, and child custody determinations. Rights “over” children reinforced the conjugal, patriarchal family and were reflected by family privacy, which empowered a man to control his household, wife, and children.<sup>203</sup> Now gender-neutral, the parental rights doctrine continues to exist. The doctrine is couched in liberal-individual and rights-respecting terms, but it clashes with the fundamental tenets of liberal individualism (which denies that one individual could have rights over another).<sup>204</sup> According to one critic, “[t]he parents are not trustees of a public good (society’s future citizens), but are owners of the individuals they have created (their children).”<sup>205</sup>

Liberal individual protections are now extended to children as well, and in custody proceedings, the state attempts to exert its *parens patriae* power to further children’s best interests. But only to a limited extent. The coexistence of parents’ rights (Biblical naturalism) and children’s rights (liberal individualism) leads to undesirable outcomes that disserve children. It has resulted in child custody rules in which a parent’s biological connection with a child can trump the child’s stronger emotional attachment to a non-parent.<sup>206</sup> And conjugality, in turn, can trump both biology and emotional attachment.<sup>207</sup> And in cases of suspected neglect or abuse, institutional practice is even more chaotic. It is all too easy for the state to justify their “temporary” removal from the home, because it does not view itself as disrupting the legal right of parents to their children in these cases. That a “legal” parent-child relationship continues to exist means nothing to a child, of course. Temporary removals, in about half of all cases, become long-term removals. Because many parents fail to respond to state-provided services

<sup>202</sup> It would not give them total freedom, of course, since their marriages would then exist within a pre-existing institutional structure.

<sup>203</sup> See *supra* notes 45-50; 130-33; 154-65; and accompanying text.

<sup>204</sup> See John Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 54 (1987). Elster discusses the tension between children’s rights/interests and parental rights, but argues that children’s interests should not trump those of their parents and that parental rights and needs should be considered.

<sup>205</sup> See HERRING, *supra* note 164 (citing Barbara Bennett Woodhouse, “Who Owns the Child”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992)).

<sup>206</sup> See *supra* notes 45-50, and accompanying text.

<sup>207</sup> See *Michael H. v. Gerald G.*, 491 U.S. 110, and *supra* note 25 and accompanying text.

and requirements (even when – as is not always the case – those services are actually offered), children remain in temporary care arrangements, often developing new attachments. And because it is difficult to meet the heightened legal standard required in order to terminate parents' rights to their children, it is usually years before children receive permanency.<sup>208</sup>

Together, the laws that express Biblical naturalism and liberal individualism shape doctrines that affect the lives of millions of individuals. And together, its foundational principles are wreaking havoc on the most significant and wide-ranging of our family laws.

### CONCLUSION

This Article has proposed a theory of the nature of U.S. family law that explains our social practices. It draws from the structure of family law's rules and practices the content of its key concepts—conjugal, privacy, contract, and *parens patriae*. These practices and concepts both effectuate and make explicit the principles of Biblical naturalism and liberal individualism.<sup>209</sup> These principles underlie our family law and unify many of our ordinary, unreflective beliefs and practices.<sup>210</sup> Now that those principles have been exposed, we must examine what place in our public life we wish to give them.<sup>211</sup> At a minimum, this Article seeks to launch a much-needed debate in family law on whether our current foundational principles are desirable, or even defensible. More ambitiously, the Article seeks to ground a much-needed jurisprudence of family law that better reflects the social goals and needs of contemporary U.S. society.

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<sup>208</sup> See *Santosky v. Kramer*, 455 U.S. 745 (1982) (requiring that decisions terminating parental rights be proven by clear and convincing evidence). See also, Jennifer Wriggins, *Parental Rights Termination Jurisprudence: Questioning the Framework*, 52 S.C. L. REV. 241 (2000).

<sup>209</sup> See COLEMAN, *supra* note 5, at 54-55.

<sup>210</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 155-56 (1977); JOHN RAWLS, *A THEORY OF JUSTICE* 48 (1971).

<sup>211</sup> See COLEMAN, *supra* note 5, at 5.