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"Toward a Contractarian Account of Family Governance"

Marsha Garrison

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When family members make decisions, they often engage in acts of governance. The terms and conditions of family governance are embodied in family law, which lays out a kind of "constitution" delimiting the offices, powers, and rights of individual family members.

In this paper I want to explore the topic of family governance from several substantive perspectives. First, I will sketch some ways in which governance issues can illuminate family law issues; I will argue that governance norms can be used both to develop the links between seemingly disparate areas of family law and to provide a basis for evaluating legislation and judicial decisions. Second, I will argue that, as a result of the rapidity with which many areas of family law have recently changed, the governance model embedded in contemporary family law contains a significant number of gaps and inconsistencies. Finally, I will sketch one possible approach to developing a fairly full account of family governance appropriate for today's families.

The approach I will employ is derived from the contractarian tradition developed by Hobbes, Locke, and Rousseau and recently reinvigorated by John Rawls. The contractarian methodology offers a well-developed and still vital tradition that underlies many of our social and political institutions. Because it relies on the self-interested decisions of autonomous individuals as a basis for the development of societal institutions, the methodology is highly compatible with our current tendency to view the family as a set of relationships based on voluntary association as well as status. It can also be utilized to develop a detailed account of governance norms.

I should stress that my thoughts on all the issues presented in the paper are tentative. My aim is not to lay out a fully developed program, but instead to outline one possible approach and spur more thinking on this important topic.

I. THE NATURE OF FAMILY GOVERNANCE

Governance describes the functions and powers of actors within an established system of political administration. Governance is not confined to the state, of course; private organizations typically have governments to manage their internal affairs as well. The methods of governance vary just as widely as do the entities that employ them. Both despotism and constitutional democracy are forms of governance; government officials may conduct business in accordance with established rules and procedures or, if so empowered by their offices, may act on the basis of whim and caprice.

Despite the range and variability of governments, we do not typically think of family decision making as governmental. But Mom's announcement "Bedtime!" or

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Dad's purchase of a new car over Mom's objection nonetheless are governmental, in the sense that Mom's and Dad's acts represent the exercise of power or authority based on official status. Mom is empowered by law to prescribe certain rules of conduct, including bedtime, for the youthful members of her family.[1] Assuming that Mom and Dad live in a common law property jurisdiction and the funds for the car are derived from Dad's income, Dad is empowered by law to decide how those funds will be spent.[2]

Family decision makers tax, spend, make rules, and sanction misbehavior; their powers are defined by their offices or status; their authority is backed by the force of the state. The family thus functions differently than an ad hoc entity like a group of friends planning a picnic. These friends must agree on the terms of their enterprise. None can bind or set rules to govern the conduct of another. All may abandon the enterprise for any reason and at any time.

Many other private groups—churches, clubs, schools, community organizations—have governments.[3] Their governmental authorities, like those of the family, will typically have the power to tax, spend, make rules, and sanction misbehavior. But while family members have state-defined powers and entitlements, members of these other organizations generally do not. The authority of their officers is not typically backed by the force of the state;[4] the offices, powers, and conditions for entry into and exit from these organizations are not typically state-prescribed.[5]

Family governance thus represents a perhaps unique blend of tradition-based and state-defined prerogatives. Although the family may well be the most intimate and private of associations, the terms of its governance rest to a substantial extent on public prescription.[6]

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[1]Mom is also empowered by tradition, of course. The Supreme Court has declared that "[it] is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166 (1944); *accord*, Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). But the state both enhances and limits tradition-based parental authority. *See Prince*, 321 U.S. at 170-71 (upholding parental conviction under state child labor laws).

[2]*See* LESLIE J. HARRIS ET AL., FAMILY LAW 8–13 (1996) (describing common law property system); HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 286–99 (2d ed. 1988) [hereinafter CLARK (2d ed.)] (describing legal position of married women).

[3]*See* LON L. FULLER, THE MORALITY OF LAW 125 (rev. ed. 1969) (describing college rules as "legal system in miniature").

[4]Challenges to decisions of these entities may be subject to judicial review. *See Comment, Private Government on Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362 *passim* (1963).

[5]For example, the Supreme Court has held that genuinely private clubs and organizations may discriminate in a way that would be illegal by a public entity. *See* Moose Lodge #107 v. Irvis, 407 U.S. 163, 171–73 (1972).

[6]See MAX WEBER, ON LAW IN ECONOMY AND SOCIETY 334–37 (Max Rheinstein ed., Simon & Schuster 1967) (describing methods of domination through organization and sources of leaders' legitimacy).

II. FAMILY GOVERNANCE AND FAMILY LAW

Family law sets out the terms on which family governance is exercised. Family law is thus "constitutional," in that it prescribes a "Bill of Rights" for individual family members, the authority of family decision makers, the procedures for overturning "illegal" decisions by those decision makers, and even the grounds upon which the decision makers may be removed from "office."[7] The result is that family governance is neither anarchic nor despotic; it is bound by the rule of law.

We do not usually think of family law in these terms. What does this alternate view add to our more commonplace understanding of the family and family law?

A. Governance and the Structure of Family Law

First, a focus on family governance can illuminate linkages between seemingly disparate areas of family law. Consider the advent of no-fault divorce and abortion rights during the 1960s and 70s. At first glance, these legal developments appear unrelated; in our own country, indeed, one derived from widespread legislative activity at the state level[8] and the other from a constitutional pronouncement.[9] But they do, in fact, share common roots: Both reflect a deep shift in the prevailing model of family governance.

One clue to the linkage is timing. In 1965, no American state or European nation offered either divorce or abortion on demand; by 1985, virtually all did, at least in some circumstances.[10] This is a remarkable shift both in its speed and scope. The two developments are also similar in that, in each case, the enactment of new laws was preceded by a lengthy period in which evasion of the formal law was widespread and aided by the collusion of professionals (lawyers with respect to divorce, doctors with respect to abortion).[11]

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[7]Divorce law sets out the grounds for spouses; laws governing abuse, neglect, termination of parental rights, and emancipation set out the grounds for loss of parental "office."

[8]For historical accounts of the move to no-fault divorce, see HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES *passim* (1988); Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 664–69 (1984); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault divorce and Its Aftermath*, 56 U. CINN. L. REV. 1, 4–15 (1987).

[9]*See* Roe v. Wade, 410 U.S. 113, 152–53 (1973).

[10]*See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 14 tbl. 1, 168 tbl. 2 (1987) (categorizing abortion and divorce laws respectively, with dates of enactment).

[11]The classic accounts of collusive practices in divorce law are Richard H. Wels, *New York: The Poor Man's Reno*, 35 CORNELL L.Q. 303 *passim* (1950); Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 COLUM. L. REV. 1121 *passim* (1936). For accounts of collusive practices concerning abortion, *see* GLENDON, *supra* note 10, at 12; LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 34–35 (1990).

Both abortion and divorce represent a means of exit from an unwanted family tie. The former rules demanded a socially acceptable reason for such an exit;[12] the newer rules do not.[13] Legal developments in both areas of law are thus "pro-choice" in the sense that they enhance the personal freedom of individual family members at the expense of group ties.

Professor Mary Ann Glendon has argued that changes in abortion and divorce law (or at least their American variants) were linked by a common de-emphasis of family responsibility and obligation.[14] (Glendon's focus on these two legal reforms is, of course, one of the reasons I have chosen them as examples.) But when viewed as part of a larger set of changes in family law, an emphasis on individual autonomy is more evident than is a de-emphasis of family responsibility. For example, during the same time period that reforms in abortion and divorce law took place, "psychological parenting" theory produced a new willingness to prefer the child's functional relationships over those based on legal status[15] and a range of enactments enhanced the likelihood of effective child support enforcement.[16] Neither of these reforms can easily be characterized as anti-responsibility; indeed, both focus on the satisfaction

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[12]Prior to abortion liberalization, most jurisdictions permitted abortion when necessary to preserve the mother's life. *See* GLENDON, *supra* note 10, at 11–12. Prior to no-fault divorce, divorce was available only when a ground for fault existed. Adultery was universally a ground; abandonment and cruelty were typically grounds as well. For a discussion of the historical evolution from fault-based to no-fault divorce, see, for example, CLARK (2d ed.), *supra* note 2, at 405–11; HARRIS ET AL. *supra* note 2, at 272–313.

[13]It is also possible that the shift in legal standards represents a new social consensus, but, at least for abortion, public opinion suggests otherwise.

[14]*See* GLENDON, *supra* note 10, at 58 ("Our [American abortion] law stresses autonomy, separation, and isolation in the war of all against all."); *see also id.* at 108 ("The American story about marriage, as told in the law and in much popular literature, goes something like this: marriage is a relationship that exists primarily for the fulfillment of the individual spouses.").

[15]The phrase "psychological parent" was apparently coined by Anna Freud, Joseph Goldstein, and Albert J. Solnit, whose works BEYOND THE BEST INTERESTS OF THE CHILD (1973) and BEFORE THE BEST INTERESTS OF THE CHILD (1979) did much to spur courts and legislatures in the direction of a functional approach to parenthood. For examples of legal commentary using a psychological parenting approach, see, for example, Katherine Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 313–15 (1988) [hereinafter Bartlett, *Parenthood*] (arguing for custody decision making based on assessment of which connections between parent and child are most important); Katherine Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 882 (1984) ("[T]he child's need for continuity in intimate relationships demands that the state provide the opportunity to maintain important familial relationships with more than one parent or set of parents.") (internal citations omitted); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 464 (1990) (proposing "expanding the definition of parenthood to include anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental in nature"); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1758 (1993) (arguing in favor of functional definition of parenthood).

[16]For an overview of child support initiatives over the past 20 years, see Lowell H. Lima & Robert C. Harris, *The Child Support Enforcement Program in the United States*, *in* CHILD SUPPORT: FROM DEBT COLLECTION TO SOCIAL POLICY 20 (Alfred J. Kahn & Sheila J. Kamerman eds., 1988); Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519 (1996).

of responsibilities as a precondition for exercising rights.[17] Abortion reform, no-fault divorce, and many of the other reforms of this era thus evidence a new, generalized emphasis on individual autonomy within the family. The new emphasis on the autonomy of family members reflects a long-term shift away from authoritarian family governance norms. Return, momentarily, to the late eighteenth century when our own constitutional republic was founded. Under the common law of that period, the husband and father of the family was legally entitled to proclaim, with Louis XIV, that "l'état, c'est moi:"

> When a woman married, her identity was swallowed up in her husband's. As William Blackstone pithily put it in the eighteenth century, summing up the thrust of English common law, "The husband and wife are one, and the husband is that one." What this meant was that, with a few exceptions, a wife could not bring a legal action in a court, make a contract, or own property. If she technically had title to property, it was controlled by her husband. . . .
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> The law assumed, furthermore, that the husband as the ruler of the household had the right to use discipline to enforce his rule. In this respect, wives were subjects of the same loving despotism as servants and children. There were laws all over Europe giving men the right to beat their wives. . . . Abuse and cruelty were always frowned on, but a man was expected to do what he had to in order to be obeyed. . . .[18]

Authoritarian patriarchy began to give way during the nineteenth century with the enactment of the Married Women's Property Acts, statutory divorce laws, child and spousal support obligations.[19] By the late nineteenth century, paternal authority had also been circumscribed by laws dealing with child labor, education, and neglect.[20] The husband and father retained his role as head of the family and primary

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[17]*See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 262 (1983) (stating that biological parenthood confers only "opportunity . . . to develop a relationship . . . . If [the parent] grasps that opportunity and accepts some measure of responsibility for the child's future, he may . . . make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie."); Guardianship of Phillip B., 188 Cal. Rptr. 781, 788–92 (Cal. Ct. App. 1983); Painter v. Bannister, 140 N.W.2d 152, 158 (Iowa 1966) (awarding custody of child to grandparents rather than father because grandparents offered more stability and security).

[18]BEATRICE GOTTLIEB, THE FAMILY IN THE WESTERN WORLD: FROM THE BLACK DEATH TO THE INDUSTRIAL AGE 91 (1993).

[19]For historical accounts of the alteration in married women's rights, see, for example, CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT (1980); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA (1985); ELIZABETH B. WARBASE, THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN 1800–61 (1987); Richard Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983). For an historical account of the changing role of women in the family, see HOUSEHOLD CONSTITUTION AND FAMILY RELATIONSHIPS (Nancy F. Cott ed., 1992).

[20]A detailed account of these developments, utilizing a variety of original sources, is contained in CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY (Robert H. Bremner ed. 1971). *See also* ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 916–21, 926–36 (3d ed. 1995) (summarizing development of compulsory education and child labor laws); Steven Mintz, *Children, Families, and the State: American Family Law in Historical Perspective*, 69 DENV. U. L. REV. 635 (1992) (describing shifts in legal rules relating to children).

decision maker, but his powers were now limited by laws that mandated support for other family members and set boundaries on the exercise of his authority.

This new governance model was reciprocal; the obligations of wife and children to the family patriarch were contingent on the proper exercise of his authority. The patriarch who committed adultery could lose his wife (but still be required to support her); the patriarch who abused his children could lose them to the state (but still bear responsibility for their support). Conversely, wife and child risked losing their support entitlements unless they complied with the patriarch's reasonable commands.[21] While reciprocal, governance under this model was not democratic. The family patriarch was entitled to select the domicile of other family members;[22] family immunities, that denied individual family members the right to maintain a tort action against another, also survived intact.[23] But the legal identities of individual family members were no longer submerged in that of the patriarch. And individual obligations to the patriarch were conditioned on fulfillment of his obligations to them. Despotism, in short, had evolved into constitutional monarchy.

A range of legal developments dating from the 1960s and 70s reflects yet another evolution in governance: Constitutional monarchy has begun to give way to a more democratic and egalitarian governance model. The new model does not rely on sex-based roles and obligations or emphasize the inviolability of family ties. Instead, it relies on gender-neutral rules and obligations; it "emphasize[s] the individuality of the members of the conjugal family as well [as] . . . facilitat[ing] their independence from it and each other."[24] The new governance model links developments as diverse as abortion reform, no-fault divorce, abandonment of the "tender years" presumption in custody law,[25] a more functional definition of parenthood, and

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[21]*See, e.g.*, HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 331–34, 445–46 (1st ed. 1968) [hereinafter CLARK (1st ed.)] (describing restrictions on wife's alimony right); 67A C.J.S. *Parent and Child* § 56 (1978) (describing restrictions on child's support right).

[22]See CLARK (1st ed.), *supra* note 21, at 150 ("When she marries, the wife normally takes the husband's domicile automatically in place of her previous domicile of choice. So long as they live together she continues to have his domicile.") (internal citations omitted).

[23]As late as 1968, the author of a leading family law treatise reported that only 17 states had abolished spousal immunity, and that, while "one might suppose that other states would join the chorus and discard the immunity, this does not seem to be happening." *Id.* at 254.

[24]MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 245 (1981).

[25]Under the common law, the father of a child was entitled to custody. Blackstone held that the mother was "entitled to no power [over her children], but only to reverence and respect." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *453.

Over the course of the nineteenth century, "growing concern with child nurture and the acceptance of women as more legally distinct individuals, ones with a special capacity for moral and religious leadership and for child rearing, undermined the primacy of paternal custody rights. . . ." GROSSBERG, *supra* note 19, at 239. By the late nineteenth century, American courts universally awarded custody based on the "best interests of the child," augmented by the "tender years doctrine," which established a rebuttable presumption that a young child belonged with its mother. *See generally* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS (1994).

While the tender years doctrine survived in all jurisdictions until the 1960s and in some until considerably later, courts and legislatures have now universally moved toward a gender-neutral application of the best interests standard. *See, e.g.*, Bazemore v. Davis, 394 A.2d 1377, 1383 (D.C. 1978); Ex Parte Devine, 398 So.2d. 686, 695 (Ala. 1981) (holding tender years presumption impermissibly discriminates between fathers and mothers in child custody on the basis of sex); Pusey v. Pusey, 728 P.2d 117, 119 (Utah

a children's rights movement[26]—links that are extremely difficult to discern unless we focus on governance issues.

B. Governance Norms as a Means of Evaluating Family Law Rules and Decisions

When we see a governmental constitution lurking behind diverse family law rules, we not only have a means of understanding legal reforms; we also have a means of evaluating legislative enactments and judicial pronouncements. We can ask whether they comport, or conflict, with the "constitution of the family."

Consider the well-known, and controversial, case of *McGuire v. McGuire*.[27] Starkly put, Mr. McGuire was a miser who maintained strict control of the income and capital within his control, refusing to buy basic necessities like indoor plumbing, a car heater, and an electric refrigerator. Mrs. McGuire, who had walked into this situation as a young widow with two minor children thirty-three years earlier, sued Mr. McGuire for support. The trial court granted her the support she requested, but the appellate court reversed, holding that, while Mr. McGuire did indeed have a legal obligation to support his wife,

> "[t]he living standards of a[n intact] family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf. As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is supporting his wife. . . . Public policy requires such a holding. . . ."[28]

Much ink has been spilled over *McGuire*, most of it focused on whether public policy does, in fact, require closing the courthouse door to members of an intact family. Professor Teitelbaum, for one, has questioned the wisdom of denying Mrs. McGuire her day in court, noting that "the practical consequence of . . . the[] decision[] is to confer or ratify the power of one family member over others"[29] and thus to "ratif[y] the naturally existing or socially created inequalities which have led to the victory of one over the other."[30] Other commentators have approved the *McGuire* holding, arguing, in Professor Hafen's words, that "constant legal intervention (or the threat of it) will destroy the continuity that is critically necessary for meaningful, ongoing relations and developmental nurturing" and that "increas[ing]

1986) (holding gender cannot be used as factor for determining custody).

[26]For an historical account of the movement, see Martha Minow, *Children's Rights: Where We've Been, and Where We're Going*, 68 TEMPLE L. REV. 1573 (1995).

[27]This account is based on the appellate opinion in *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953).

[28]*McGuire*, 59 N.W.2d at 342.

[29]Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1174.

[30]*Id.* at 1178.

state intervention in an ongoing family to protect the autonomy of some family members . . . may simply exchange one threat to autonomy for another."[31]

In looking at this debate, it is important to note that Professors Teitelbaum and Hafen probably agree on the propriety of state intervention in many, if not most, cases. I doubt that Professor Teitelbaum would favor state intervention for disputes about the division of the family's jelly beans or who washes the dishes;[32] I doubt that Professor Hafen would take cases involving assault, child abuse, or income and property disputes within the separated family out of court in order to enhance familial autonomy or developmental nurturing. *McGuire* is an interesting case because it arouses disagreement rather than consensus; that disagreement stems, I suspect, from a more fundamental disagreement over the structure of family governance.

Reconsider Professor Teitelbaum's claim that the "the practical consequence [of the McGuire outcome] . . . is to confer or ratify the power of one family member over others"[33] and thus to "ratif[y] the naturally existing or socially created inequalities which have led to the victory of one over the other."[34] Professor Teitelbaum is undeniably right that this is the practical consequence of the *McGuire* decision.[35] What makes his claim appealing is the court's acceptance of Mrs. McGuire's argument that she is entitled to reasonable support from her husband. If she has such a legal right, should she not also have a legal remedy?

While the right-without-remedy issue is clearly part of what has aroused interest in *McGuire*, the court's reluctance to help Mrs. McGuire does not appear to derive from fear of state intervention's impact on either familial autonomy or developmental nurturing. Instead, it seems rooted in the sheer number of Mrs. McGuires: those with a heated car and indoor plumbing but no refrigerator; those with a refrigerator but no car at all; and those with a refrigerator and heated car and indoor plumbing but an outmoded wardrobe.

The court's unwillingness to grant Mrs. McGuire a remedy seems to stem, in short, from the specter of the floodgates opened, those same floodgates that have led courts to hold that schools have no duty to educate,[36] the police no duty to protect the

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[31]Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865, 912 (1989); *see also* Mary Ann Glendon, *Power and Authority in the Family: New Legal Patterns as Reflections of Changing Ideologies*, 23 AM. J. COMP. LAW 1, 9–10 (1975).

[32]I also doubt that Professor Teitelbaum would wish to overturn the result in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67–72 (1976), which denied a forum to a husband aggrieved by his wife's decision to have an abortion.

[33]Teitelbaum, *supra* note 29, at 1174.

[34]*Id.* at 1178.

[35]It is important to keep in mind that the converse of Professor Teitelbaum's statement is also true. Were the court to have intervened, it would have ratified Mrs. McGuire's socially (i.e., legally) conferred power to demand support from her husband. Both through action and nonaction, the state supports the power of some individuals within the family and fosters a particular allocation of decision making authority, or model of family governance. Professor Teitelbaum's statement, facially neutral, masks a claim that the court should have acted to enhance Mrs. McGuire's power instead of her husband's.

[36]*See, e.g.*, Donohue v. Copiaque Union Free School Dist., 391 N.E.2d 1352, 1353–54 (N.Y. 1979); Peter W. v. San Francisco Unified School Dist., 131 Cal. Rptr. 854, 861 (Cal. Ct. App. 1976).

public,[37] parents no duty to supervise their children,[38] and bystanders no duty to rescue a fellow being in distress.[39] Courts do not want to hear such cases because of the fear that they will be numerous, time consuming, and extremely difficult to resolve in a fair and consistent manner. In each instance, it is hard to differentiate nonremediable disputes from those that involve a justiciable legal claim.[40]

Just as in the tort context, of course, it is possible, to fashion a rule that would keep some disputes about family expenditure out of court and give entry to others. That is, in fact, exactly what the *McGuire* court did. While denying a forum to Mrs. McGuire, it explicitly affirmed the right of separated wives to a hearing on support.[41] And, while it did not directly address this possibility, the court was certainly aware that, under the necessaries doctrine, Mrs. McGuire could have indirectly obtained a hearing on support by purchasing the refrigerator and car heater using her husband's credit.[42] These standards—separation and the purchase of necessaries—offer bright line tests of serious support inadequacy, just as the rule permitting suit by a criminal victim who has relied on the police for protection offers a means of identifying a particularly egregious form of inadequate policing.[43] The disagreement between Professor Teitelbaum and the *McGuire* court thus comes down to whether this is the correct line.

The disagreement between Professor Teitelbaum and the *McGuire* court is not, of course, solely about the ease with which a different line might be drawn. Just as in the tort context I alluded to a moment ago, the placement and brightness of the line drawn will reflect a range of policy concerns—the foreseeability and degree of harm to the plaintiff, the moral blame attached to defendant's conduct, the possibility of preventing future harm.[44] But, ultimately, "it is all a question of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."[45]

I believe that the *McGuire* court was content with the line it drew because that line was both practical and consistent with the "constitutional monarchy" model of family governance embedded in the law of Nebraska, and most other American

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[37]*See* Riss v. New York, 240 N.E.2d 860, 861 (N.Y. 1968).

[38]*See* Goller v. White, 122 N.W.2d 193, 198 (Wis. 1963) (holding that children have no cause of action against their parents for negligent supervision); Halodook v. Spencer, 324 N.E.2d 338, 346 (N.Y. 1974) (same). *But see* Gibson v. Gibson, 479 P.2d 648 (Cal. 1971) (holding that child may maintain negligence action against parent).

[39]*See* Buch v. Amory Mfg. Co., 44 A. 809 (N.H. 1897); Yania v. Bigan, 155 A.2d 343 (Pa. 1959); *see also* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 340–48 (4th ed. 1971).

[40]These claims can, of course, be exaggerated. For example, most European countries impose a duty to rescue, as does the State of Vermont. Their courts have not been overwhelmed with nonjusticiable disputes. Indeed, there is no evidence that the imposition of a duty to rescue produces much litigation.

[41]"*As long as the home is maintained and the parties are living as husband and wife,* it may be said that the husband is legally supporting his wife." 59 N.W.2d at 342 (emphasis added).

[42]*See* CLARK (1st ed.), *supra* note 21, at 189–92 (describing necessaries doctrine).

[43]*See, e.g.*, Schuster v. City of New York, 154 N.E.2d 534, 537 (N.Y. 1959); DeLong v. County of Erie, 457 N.E.2d 717, 722 (N.Y. 1983).

[44]See Rowland v. Christian, 433 P.2d 561, 568 (Cal. 1968) (describing policy bases for decision whether or not to impose duty in tort cases).

[45]Palsgraf v. Long Island R.R., 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting).

jurisdictions, in 1953. Under this model, recall, Mr. McGuire was legally the head of the household and had the right to determine the family's domicile and mode of living. Mrs. McGuire was duty-bound to follow him and her refusal to do so without sufficient excuse amounted to desertion.[46] Mr. McGuire had a duty to support Mrs. McGuire, but each spouse individually owned and managed his or her own income and property;[47] Mrs. McGuire would obtain a share (probably one-third) of Mr. McGuire's estate at his death,[48] but had no right of management or ownership during his lifetime. Mrs. McGuire could leave her husband, but her desertion would give Mr. McGuire grounds for divorce or separation and likely would deprive Mrs. McGuire of her support right.[49] Conversely, of course, Mrs. McGuire would have grounds for divorce and could obtain support, in the form of alimony, if Mr. McGuire were to turn her out of the house.[50] Neither spouse could obtain a divorce based on mere inclination.[51]

The result in *McGuire* is fully consistent with this governance model. It emphasizes male decision-making authority, individual property entitlements, and marital continuity in the face of conflict. Professor Teitelbaum's critique of *McGuire* fails to take account of the fact that the decision is altogether appropriate in light of the then-current model of family governance.

C. Family Governance as Family Policy

My account of *McGuire* suggests a methodology for addressing a broader range of substantive and procedural issues in family law: In choosing a result, we might base our decision, at least in part, on the extent to which the possibilities are consistent with the "constitution of the family." Just as they did in *McGuire*, practical concerns must also play a role, but the prevailing model of family governance would occupy an important, if not paramount, place in our analysis.

This methodological suggestion is not, of course, novel; there is widespread agreement among family law scholars that the expression of contemporary values and beliefs is one of family law's most important functions.[52] Commentators have also noted the desirability of an explicit family policy as a basis for specific legislative

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[46]*See* CLARK (1st ed.), *supra* note 21, at 339 (stating that "if the wife refuses to live in the domicile chosen by her husband, she is a deserter, unless the husband's choice is unreasonable or made in bad faith").

[47]*See id.* at 224–26 (describing Married Women's Property Acts). Mrs. McGuire could pledge her husband's credit and force him to defend lawsuits brought by the plumber and furniture store under the necessaries doctrine; he could not pledge her credit.

[48]For a description of spousal right of election laws, see, for example, JESSE DUKEMINIER & STANLEY M. JOHANSEN, WILLS, TRUSTS AND ESTATES 483–84 (5th ed. 1995); LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 473–76 (1991).

[49]*See* CLARK (1st ed.), *supra* note 21, at 331–34, 445–46.

[50]*See id.* at 331–40.

[51]See *supra* note 10, and accompanying text.

[52]For recent analyses of the expressive function of family law, see, for example, MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 176–84 (1993); Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992); Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991 (1991).

enactments.[53] The *McGuire* court did not utilize the governance or policy-based approach explicitly; but I think that at some level it did. I also suspect that Professor Teitelbaum's comments on *McGuire* rely on a model of family governance; but it is the more democratic model of which no-fault divorce and abortion rights are exemplary that Professor Teitelbaum appears to have in mind.[54]

The trend in favor of democracy is now well-established, and certainly part of the reason for the amount of ink spilled over *McGuire*—particularly the ink suggesting that the court got it wrong—is that spousal equality is now widely seen as desirable, but has not yet been fully established in either law or fact.[55] Hence the desire to grant Mrs. McGuire a forum in order to enhance her power and create greater democracy within the McGuire family.

Does a democratic family governance model *require* granting Mrs. McGuire a forum on support? This is, I think, what Professor Teitelbaum may ultimately be suggesting. But it is not so easy to determine whether Professor Teitelbaum is right or wrong. The first problem is that the support right on which Mrs. McGuire relied derived from the underlying patriarchal governance structure. The family monarch owed his subjects reasonable support in return for their respect and obedience;[56]

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[53]*See* JOHN DEMOS, PAST, PRESENT AND PERSONAL: THE FAMILY AND THE LIFE COURSE IN AMERICAN HISTORY 39 (1986) (stating that the United States "stands almost alone among Western industrialized countries in having no coherent 'family policy'"); Glendon, *supra* note 10, at 135 ("[American] family policy is implicit, contained in the details of tax law . . . and so on. Because it is implicit it is largely unexamined, and its implications for family life are insufficiently aired and discussed."); *id.* at 142 ("[W]e need to make the effort to understand what the totality of our legal regulations relating to family life is saying about our society and the way we view families, individuals, human life, dependency and neediness in all its forms.").

[54]The substantive entitlements of individual spouses have shifted in accordance with this democratization of family governance. Today, in most states, both spouses have support obligations and may find their credit bound by the necessaries doctrine. *See, e.g.*, Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum, 417 A.2d 1003, 1005 (N.J. 1980) (holding that "[b]oth spouses are liable for necessary expenses incurred by either spouse in the course of marriage"); North Carolina Baptist Hosps., Inc. v. Harris, 354 S.E.2d 471, 474 (N.C. 1987) (same). Some jurisdictions have imposed liability on the wife only where the husband is unable to pay for his own necessaries. *See, e.g.*, Borgess Med. Ctr. v. Smith, 386 N.W.2d 684, 687 (Mich. Ct. App. 1986) (holding that wife is responsible for deceased husband's necessary medical costs); Marshfield Clinic v. Discher, 314 N.W.2d 326, 330–31 (Wis. 1982) (upholding rule allowing creditor to collect for necessaries from wife, but only after first attempting to collect from husband). Some states have also attained gender neutrality by abandoning the necessaries doctrine. *See, e.g.*, Condore v. Prince George's County, 425 A.2d 1011, 1019 (Md. 1981) (abolishing ancient necessaries doctrine and finding neither husband nor wife liable for other's medical costs); Schilling v. Bedford County Mem. Hosp., Inc., 303 S.E.2d 905, 908 (Va. 1983) (same); *see generally* Margaret M. Mahoney, *Economic Sharing During Marriage: Equal Protection, Spousal Support, and the Doctrine of Necessaries*, 22 J. FAM. L. 221 (1983–84).

[55]Husbands are more likely to dominate spending decisions; they are less likely, even when the wife works full-time outside the home, to perform house work or child care. *See* PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 53–59, 62–64; 144–46 (1983); ARLIE HOCHSCHILD, THE SECOND SHIFT 216–20; 259–62 (1989); FRANCES K. GOLDSCHEIDER & LINDA J. WAITE, NEW FAMILIES, NO FAMILIES? THE TRANSFORMATION OF THE AMERICAN HOME 107–23 (1991); JAN PAHL, MONEY AND MARRIAGE (1989); Carole B. Burgoyne & Alan Lewis, *Distributive Justice in Marriage: Equality or Equity?*, 4 J. COMM. & APP. SOC. PSYCH. 101 (1994).

[56]*See* CLARK (1st ed.), *supra* note 21, at 181 (describing traditional model and noting that "[s]ince the remedies are usually indirect and since the rules only come into play when the marriage has broken down, one could describe them as predictions of what courts will do on divorce or separation rather than

nonpatriarchal, democratic governance must, of necessity, offer a different account of Mrs. McGuire's entitlements.

The next difficulty is that the nature of Mrs. McGuire's entitlement in the context of an egalitarian, democratic scheme of family governance is far from clear. One vision of egalitarian democracy might emphasize marital community and thus require joint ownership and management of family assets. But another might emphasize individual autonomy with respect to income and property and thus abandon or severely restrict support rights.[57] Equality and democracy are fuzzy ideals that fail to specify how the autonomy of individuals within the family should be balanced against the family's community interests. Given that deficiency, these ideals cannot provide clear guidance on the substantive rules of law—with respect to divorce, property, support, etc.—that channel family decision making.

The ideals of autonomy and community are both embedded in American family law today and coexist in a state of uneasy tension. Changes in the law over the past several decades evidence the pull of both and demonstrate no consistent preference or ordering principle. The move to equal or equitable property distribution at divorce[58] and the expansion of the spousal right of election[59] emphasize community. No-fault divorce, on the other hand, emphasizes autonomy; so does the expansion of abortion rights and the Supreme Court's rulings denying a husband the opportunity to contest his wife's decision to have an abortion;[60] so do the new child support guidelines that grant the payor parent a "self-support reserve."[61]

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as models of the well conducted marriage. But these rules acquire much of their force and vitality from the fact that they construct a model of correct behavior. They are moral precepts.").

[57]For example, Professor Clark, criticizing the traditional patriarchal rules, argues that "[i]n fact, the husband should not have to support his wife at all if she has sufficient income either from earnings or property to support herself adequately." *Id.* at 184. The *McGuire* court also notes Mrs. McGuire's "fairsized bank account" and rents in denying her a forum on support. *McGuire*, 59 N.W.2d at 342.

[58]*See, e.g.*, J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY 13-8.1 n.9 (1997) (categorizing state property distribution rules). For descriptions of the historical development of the equitable property distribution concept and the sources of its recent acceptance, see, for example, Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law Upon Divorce Outcomes*, 57 BROOKLYN L. REV. 621, 627–32 (1991); Mary Ann Glendon, *Property Rights Upon Dissolution of Marriages and Informal Unions*, *in* THE CAMBRIDGE LECTURES 245 (N. Eastham & B. Krivy eds., 1981).

[59]All of the common law states except Georgia statutorily grant the surviving spouse an entitlement to a share of the decedent spouse's property (typically the old dower fraction, one-third). *See* DUKEMINIER & JOHANSON, *supra* note 48, at 483–84; WAGGONER ET AL., *supra* note 48, at 473 & n.11. Many states have expanded the pool to which the right of election attaches to include a wide range of non-probate property. *See, e.g.*, DUKEMINIER & JOHANSON, *supra* note 48, at 510–12; WAGGONER ET AL., *supra* note 48, at 479.

The 1990 revisions to the Uniform Probate Code go even further and establish an entitlement to one-half of the "augmented estate" for a spouse married fifteen or more years. UNIF. PROBATE CODE art. 2, pt. 2, general comment (1990) (stating that UPC revisions were explicitly designed to "bring elective-share law into line with the contemporary view of marriage as an economic partnership . . . applied in both the common-law and community-property states when a marriage ends in divorce"); *see also* John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP., PROBATE TR. J. 303, 304–14 (1987).

[60]*See supra* note 32 and accompanying text.

[61]For a description of the self-support reserve, see *infra* note 123 and accompanying text.

We could continue this exercise and, working inductively from diverse rules, try to intuit the details of the governance model embedded in today's family law. But the rules that we would utilize were adopted at different times and in piecemeal, issue-by-issue fashion. Particularly in view of the rapidity with which family law has recently evolved, we would have, in the end, a patchwork rather than a consistent framework.

This inductive approach to family governance is still a useful one; it can show us where we are, and, by exposing the inconsistencies in our position, perhaps induce refinement of our views.[62] But to resolve specific questions, like the forum issue in *McGuire*, it would be desirable to have a fuller and clearer model of family governance.

The elaboration of such a model might serve other goals as well. The model might illuminate aspects of legislation and case law that would otherwise go unnoticed. It might facilitate the development of a coherent and consistent family policy. It might also clarify—and build—social consensus on appropriate familial behavior; the law has, to use Carl Schneider's evocative phrase, a "channelling effect" that may reinforce or undermine prevailing ideology.[63] But if legal norms are unclear, their capacity to influence opinion and behavior is reduced.

While desirable, the project of constructing a detailed governance model for the contemporary family is, needless to say, a daunting project. I do not propose even to attempt the elaboration of a full model here. But I would like to sketch one possible approach that we might use. Even here, my thoughts are tentative and I do not claim to have thought through all the issues that must be addressed.

III. TOWARD A MODEL OF DEMOCRATIC FAMILY GOVERNANCE: METHODOLOGY

A. "Global" Theories of Justice as Sources

How might we develop a model of democratic family governance appropriate for contemporary families? There are a range of approaches we might use, but

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[62]The evidence suggests that extended reflection and debate can change individuals' views on issues of justice. *See* NORMAN FROHLICH & JOE A. OPPENHEIMER, CHOOSING JUSTICE: AN EXPERIMENTAL APPROACH TO ETHICAL THEORY 55–66, 168–84 (1992).

[63]*See* Schneider, *supra* note 52, at 505–12. Mr. and Mrs. McGuire's marriage, for example, conforms to the modified patriarchal governance model in effect at the time of the *McGuire* decision. According to Mrs. McGuire, Mr. McGuire was "the boss of the house and his word was law." *McGuire*, 59 N.W.2d at 337. Mr. McGuire had exercised his prerogative to determine where the family should live—his farm, and how the family should live—meagerly. He had provided support in accordance with his own priorities; for example, he appears to have willingly paid for Mrs. McGuire's medical expenses even though he refused to purchase a new refrigerator. *Id.* Mrs. McGuire also controlled her own income and capital without any complaint on his part. *Id. McGuire* thus demonstrates the power of legal rules that conform to prevailing ideology, even when those rules are not enforced through legal sanctions. *See* BLUMSTEIN & SCHWARTZ, *supra* note 55 (reporting that surveyed couples' beliefs about marriage affected the balance of power in their relationship, with the result that the husband was more powerful when both he and the wife strongly adhered to the "male provider" view of marriage).

reliance on a "global" theory of distributive justice[64] which has as its object the overall design of society holds a number of advantages over the alternatives. One reason for reliance on such theories is the extensive involvement of the state in determining family governance.[65] More importantly, the family is a fundamental part of the basic structure of society;[66] the "little commonwealth"[67] of the family serves as both the seedbed of the larger political community and the primary sphere in which its values are transmitted.

The distribution of power and resources within the family will also mirror and shape those of the larger community.[68] It is no accident that, in societies with a tradition of male supremacy, families typically discriminate against their female members. Nor is it mere chance that hierarchical societies tend toward hierarchical families.[69]

Moreover, the distribution of familial power and resources will play a vital, perhaps crucial, role in determining the status and opportunities of family members within the larger commonwealth. If, for example, the family's male children obtain all its educational resources and the female children none, the children's prospects outside the family will vary dramatically. While the results of such systematic inequalities will be most dramatic when children are involved, adult family members are not immune from their effects.[70]

Finally, the family serves as one of society's primary sources of moral education. It is in the family that we first encounter issues involving power, justice, and the allocation of goods and responsibilities. It is here that we learn how to put ourselves into another's place and find out what we would do in his position.[71]

Because of the primacy of family life, as a determinant of social structure, individual opportunities, and individual values, a global theory of distributive justice is appropriate—perhaps crucial—to the formulation of a full account of family governance. But I should note that, while the use of a global theory to generate a governance model appears to be fully warranted and highly desirable, global theories

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[64]The adjective is Jon Elster's. *See* JON ELSTER, LOCAL JUSTICE: HOW INSTITUTIONS ALLOCATE SCARCE GOODS AND NECESSARY BURDENS 184 (1992).

[65]*See supra* notes 7–9 and accompanying text.

[66]The term is that of John Rawls. *See* JOHN RAWLS, A THEORY OF JUSTICE 462–63 (1971).

[67]JOHN LOCKE, TWO TREATISES OF GOVERNMENT 341 (Peter Laslett ed., 1960).

[68]*See* MICHAEL WALZER, SPHERES OF JUSTICE 240 (1983) ("The family . . . reproduces the structures of kinship in the larger world [and may] . . . impose[] what we currently call 'sex roles' upon a range of activities to which sex is entirely irrelevant.").

[69]*See* Barbara Harriss, *Intrafamily Distribution of Hunger in South Asia, in* 1 THE POLITICAL ECONOMY OF HUNGER (J. Dreze & Amartya K. Sen eds., 1991); Hanna Papanek, *To Each Less Than She Needs, From Each More Than She Can Do: Allocations, Entitlements and Value, in* PERSISTENT INEQUALITIES: WOMEN AND WORLD DEVELOPMENT 162 (Irene Tinker ed., 1990).

[70]The distribution of family resources may also affect the distribution of resources within the larger community. If parents fail to share resources with their children, for example, the community will likely feel obliged to grant them some form of public aid. Michael Walzer thus notes that distributive justice in the sphere of welfare and security has a two-fold meaning, referring both to the recognition of need and to group membership. Walzer suggests that a community will not allow its members to starve and that to identify those whose basic needs a community will meet is to identify those whom the community identifies as members. WALZER, *supra* note 68, at 79.

[71]*See* RAWLS, *supra* note 66, at 469.

have not often been used in this manner. Although political philosophers have written extensively about the family,[72] they have tended to assume that family relationships are governed by altruism rather than the constraints of formal justice.[73] Although this tendency has abated in contemporary discussions of marriage,[74] it is still dominant in discussions of the parent-child tie.[75] The large contemporary literature on issues of intergenerational justice, for example, admits the possibility of resource conflict between the young and old as generational groups, but almost invariably assumes parental altruism within the nuclear family.[76]

I do not wish to deny the role of altruism in family relationships. But altruism is clearly an inadequate basis for understanding the relationships of separated families,[77] and even intact families are often characterized by selfish rather than altruistic behavior. This is, indeed, an important reason for family law. Moreover,

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[72]For a useful summary of western philosophical writing on the family, see JEFFREY BLUSTEIN, PARENTS AND CHILDREN: THE ETHICS OF THE FAMILY 19–98 (1982). *See also* JACOB JOSHUA ROSS, THE VIRTUES OF THE FAMILY 124–35 (1994).

[73]*See, e.g.*, GLENDON, *supra* note 10, at 141 ("[T]he political importance of families—so obvious and central to Plato, Rousseau, and Tocqueville—is today almost always ignored."); SUSAN M. OKIN, JUSTICE, GENDER, AND THE FAMILY 9 (1989) (arguing that "contemporary theories of justice [refuse] even to discuss the family and its gender structure, much less to recognize the family as a political institution of primary importance"); Stephen G. Post, *Justice, Redistribution, and the Family*, J. SOC. PHIL., Fall–Winter 1990, at 91 (describing tendency of modern distributive justice theories to ignore the family); Peter Vallentyne & Morry Lipson, *Equal Opportunity and the Family*, 3 PUB. AFF. Q., Oct., 1989, at 27, 37–40 (arguing incompatibility of family autonomy and liberal principle of equal opportunity).

[74]*See* OKIN, *supra* note 73, at 9; WALZER, *supra* note 68, at 227–42; Onora O'Neill, *Justice, Gender, and International Boundaries*, *in* THE QUALITY OF LIFE 303 (Martha Nussbaum & Amartya Sen eds., 1993).

[75]*See, e.g.*, CHARLES FRIED, RIGHT AND WRONG 155 (1978) (arguing that parenthood enlarges "sense of autonomy . . . [so that] use of autonomy is the model for the deepest form of altruism"); FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 91 (arguing that justice must make use of "the natural partiality of parents for their children"); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 167 (1974) (stating that "it is not appropriate to enforce across the wider society the relationships of love and care undertaken within a family"); RAWLS, *supra* note 66.

[76]Indeed, the probability of a parent's partiality toward his or her own offspring is often described as a major impediment to the achievement of equality within an age cohort and between successive generations. *See, e.g.*, BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 201–27 (1980); JAMES S. FISHKIN, JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY (1983); James S. Fishkin, *The Limits of Intergenerational Justice*, *in* JUSTICE BETWEEN AGE GROUPS AND GENERATIONS 62, 73–78 (Peter Laslett & James S. Fishkin eds., 1993). For a general introduction to the literature on intergenerational justice, see the various essays collected in JUSTICE ACROSS GENERATIONS: WHAT DOES IT MEAN? (Lee M. Cohen ed., 1993); JUSTICE BETWEEN AGE GROUPS AND GENERATIONS, *supra;* and OBLIGATIONS TO FUTURE GENERATIONS (R.I. Sikora & Brian Barry eds., 1978).

[77]Parents separated from their children are not only much less likely than custodial parents to support them during their minority, but they are also less likely to share assets and income with their adult children. *See* Frank F. Furstenburg et al., *The Effect of Divorce on Intergenerational Transfers: New Evidence*, 32 DEMOGRAPHY 319 (1995) (finding that fathers and mothers had similar rates of asset transfer to their adult children following late divorces, while divorce during childhood years was associated with sharp decrease in transfers by fathers and an increase in transfers by custodial mothers; fathers who paid child support were not more likely to make intergenerational transfers); Nadine F. Marks, *Midlife Marital Status Differences in Social Support Relationships with Adult Children and Psychological Well-Being*, 16 J. FAM. ISSUES 6, 14-25 (1995) (finding that, compared to first-marriage parents, remarried and single parents generally professed less belief in parental financial obligations and were less likely to give support to their adult children).

while the family as a set of affective and altruistic relationships may lie beyond the realm of justice, family law most certainly does not.

Despite its relative inattention to the family as a political institution, contemporary political philosophy offers a number of global theories of distributive justice that we might draw on in constructing a democratic model of family governance.[78] Among these, the contractarian approach is perhaps best suited to our task.

B. The Contractarian Methodology

A contractarian views society as a cooperative venture for mutual advantage among self-interested persons; a just distribution of power and resources is that distribution to which those self-interested individuals would freely agree.[79] The contractarian tradition dates back to Locke, Hobbes, and Rousseau, and underlies many of our political institutions. The contractarian notion that government rests on the consent of the governed was, of course, a central theme in the founding of the American republic; indeed, it underlies all forms of democratic government.[80] The contractarian approach also comports with the widespread modern tendency "to understand our legal rules as resting mainly on imputed bargains"[81] and to view the family as a voluntary association bound not just by obligations, but by ties of inclination and affection.[82] For designing a nonpatriarchal, democratic form of family governance, a contractarian methodology thus seems to be singularly appropriate.

A contractarian methodology is related to, but differs from, the modern tendency to see marriage as a contract instead of a status.[83] While a contractarian account of family governance assumes that the ultimate basis of rules governing family relationships is the implied consent of family members, it does not require individu-

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[78]We could, for example, utilize a utilitarian, egalitarian, libertarian, communitarian, or feminist account of distributive justice. For a description of the prescriptions these various theories appear to offer for one family law issue, child support, see Marsha Garrison, *Autonomy or Community: An Evaluation of Two Models of Parental Obligation*, 86 CALIF. L. REV. 41, 76–86 (1998).

[79]*See, e.g.*, J.W. GOUGH, THE SOCIAL CONTRACT (2d ed. 1957) (surveying historical development of social contract tradition); RAWLS, *supra* note 66, at 4, 13.

[80]*See, e.g.*, THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE *passim* (1988) (describing Locke's influence upon founders of the American republic).

[81]John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 630 (1995).

[82]*See, e.g.*, DEMOS, *supra* note 53, at 184 (stating "the central values attaching to domestic experience nowadays . . . are those which underscore significant personal encounters"); GLENDON, *supra* note 24.

[83]*See, e.g.*, MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 131 (1989) (noting that legal rules that require sharing of property by marital partners "[s]ometimes . . . are thought of as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike"); DUKEMINIER & JOHANSEN, *supra* note 48, at 484 (reporting that under partnership theory of marriage "the economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage"); ROBERT E. GOODIN, PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES 72 (1985) (noting that "[t]he received view of marriage is insistently contractual").

ally negotiated bargains in particular family relationships;[84] it is the social contract underlying status-based rules with which the contractarian methodology is concerned.[85]

While the notion of a social contract dates back more than two hundred years, the most influential contemporary contractarian is John Rawls. Rawls's distinctive contribution to the classical social contract tradition was to posit a hypothetical "original position of equality"[86] from which the contractors would choose the principles by which society will be ordered. Rawls allows the contractors an awareness that their society will experience "moderate scarcity," as well as knowledge of "whatever general facts affect the[ir] choice of principles,"[87] including politics, economics, social organization, and human psychology.[88] However, he denies them knowledge of their individual abilities, status and "special psychological propensities"[89] within the society they will lay out.[90]

Rawls asserts that an agreement so made would be just because of its basis in an impartial process that gives each contractor equal knowledge and power.[91] He also asserts that, under these constrained circumstances, the contractors would opt for two principles of justice:

> First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.
> Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage; and (b) attached to positions and offices open to all.[92]

While some of Rawls' critics have argued against the necessity of the original position approach and many have criticized his conclusions about what principles of justice the contractors would select,[93] the claim that the approach is procedurally fair has been well received. We might then ask what principles the contractors would select for family governance.

Rawls, it is important to note, did not focus on the family in *A Theory of Justice* except in very limited respects. He did develop at some length a theory of moral

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[84]For arguments in favor of individual contractual ordering of marriage, see, for example, LENORE J. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW (1981); Marjorie Maguire Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 207 (1982).

[85]For this reason, critiques of the individual contract approach focused on its tendency to ignore the communal aspect of family relationships are not, in my view, relevant. For such critiques, see REGAN, *supra* note 52, at 118–53; Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 UTAH L. REV. 537, 545–48.

[86]RAWLS, *supra* note 66, at 12.

[87]*Id.* at 137.

[88]*See id.*

[89]*Id.* at 12.

[90]*See id.* at 11–.2, 136–50 (offering a detailed account of the original position).

[91]*See id.* at 13–14.

[92]*Id.* at 60; *see also id.* at 151–52, 302.

[93]*See generally* READING RAWLS: CRITICAL STUDIES OF A THEORY OF JUSTICE (Norman Daniels ed., 1976); BRIAN BARRY, THE LIBERAL THEORY OF JUSTICE: A CRITICAL EXAMINATION OF THE PRINCIPAL DOCTRINES IN "A THEORY OF JUSTICE" (1973).

development in which the parent-child relationship plays a central role;[94] he also examined in some detail the question of how much one generation should save for the next.[95] But he neatly side-stepped issues of intrafamilial justice by presuming that persons in the original position represent family lines, with ties of sentiment between successive generations.[96]

Susan Okin and other feminist critics of Rawls have ably criticized Rawls's failure to take account of gender inequalities within the family.[97] The assumption of ties of sentiment between successive generations—particularly Rawls's use of this assumption to generate intergenerational savings—has also been criticized by a number of theorists.[98]

In more recent work, Rawls has expressed the belief that his theory is applicable to "problems of gender and the family."[99] Last year he offered an account of how the theory applies. In Rawls's view, "[t]he family is part of the basic structure since one of its main roles is to be the basis of the orderly production and reproduction of society and its culture from one generation to the next;" thus, although "[t]he principles of political justice are . . . not to apply directly to the internal life of the . . . family, . . . they do impose essential constraints on the family as an institu-

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[94]Rawls notes that parents instill in the child the desire to become the sort of person that they are, and that healthy moral development requires that

> parents must love the child, . . . be worthy objects of his admiration . . . [and] enunciate clear and intelligible (and of course justifiable) rules adapted to the child's level of comprehension. . . . The parents should exemplify the morality which they enjoin, and make explicit its underlying principles as time goes on. . . . Presumably moral development fails to take place to the extent that these conditions are absent, and especially if parental injunctions are not only harsh and unjustified, but enforced by punitive and even physical sanctions.

RAWLS, *supra* note 66, at 465–66. This account assumes that the family serves as an agent of justice, and thus does not, as have some other political philosophers, place the family outside the realm of formal justices

[95]Because he assumes that everyone in the original position will be in the same generation, Rawls is forced to assume altruism between generations in order to generate savings at all:

> [T]hey try to piece together a just savings schedule by balancing how much at each stage they would be willing to save for their immediate descendants against what they would feel entitled to claim of their immediate predecessors. Thus imagining themselves to be fathers, say, they are to ascertain how much they should set aside for their sons by noting what they would believe themselves entitled to claim of their fathers.

Id. at 289–90.

[96]*See id.* at 128–29 (stating that "we may think of the parties as heads of families, and therefore as having a desire to further the welfare of their nearest descendants").

[97]*See* OKIN , *supra* note 73, at 95–96, 101–09; *see also* Linda R. Hirshman, *Is the Original Position Inherently Male-Superior?*, 94 COLUM. L. REV. 1860 (1994); Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992).

[98]In *A Theory of Justice* Rawls describes the contractors as "represent[ing] family lines, with ties of sentiment between successive generations." RAWLS, *supra* note 66, at 128–29, 146. Rawls uses the assumption of ties of sentiment to derive a "just savings schedule." In Rawls's view, the contractors would derive such a schedule by "balancing how much at each stage they would be willing to save for their immediate descendants against what they would feel entitled to claim of their immediate predecesors." *Id.* at 289. For representative critiques of Rawls's approach to intergenerational savings, see, for example, BRUCE ACKERMAN, *supra* note 76, at 222–25; Kenneth Arrow, *Rawls' Principle of Just Savings*, 75 SWEDISH J. ECON. 323 (1973); R.M. Hare, Rawls' Theory of Justice, *in* Reading Rawls, *supra* note 93, at 81, 97–10 .

[99]JOHN RAWLS, POLITICAL LIBERALISM xxix (1993).

tion."[100] Rawls appears to see economic inequalities occasioned by familial dissolution as a problem subject to constraint, as he notes that "[i]t seems intolerably unjust that a husband may depart the family taking his earning power with him and leaving his wife and children far less advantaged than before . . . A society that permits this does not care about women, much less about their equality, or even about their children, who are its future."[101]

But issues of justice within the family, according to Rawls, are not to be decided on the basis of those principles applicable to society as a whole:

> As citizens we have reasons to impose the constraints specified by the political principles of justice on associations; while as members of associations we have reasons for limiting those constraints so that they leave room for a free and flourishing internal life appropriate to the association in question. Here again we see the need for the division of labor between different kinds of principles. We wouldn't want political principles of justice—including principles of distributive justice—to apply directly to the internal life of the family.[102]

In this statement, Rawls seems to suggest that principles of justice should not apply to all aspects of family life. There is certainly merit in this point of view; we do not want to require Mom and Dad to divide every bag of jelly beans in accordance with principles of justice. But neither, of course, do we want to require government officials to make every decision based on principles of justice. A legislature is not unjust because it passes the occasional "pork-barrel" bill that unfairly benefits a few at the expense of the many any more than a family is unjust if the jelly beans are divided unequally.

What Rawls fails to discuss is the possibility of using principles of justice to formulate a basic governmental structure for the family, still leaving room for a "free and flourishing internal life." But the original position postulated by Rawls as a heuristic device is easily amended to accomplish this purpose. All we need do—as Okin and other feminist critics of Rawls have noted—is revise the original position scenario so that the contractors are self-interested individuals rather than altruistic family heads.[103] Family life, gender, and the parent-child relationship then come squarely into focus.

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[100]John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 789 (1997); *see also id.* at 790–91 ("[W]e are not required to treat our children in accordance with political principles. . . . [T]he principles of justice impose constraints on the family on behalf of children who as society's future citizens have basic rights as such."); RAWLS, *supra* note 66, at 7 (describing "monogamous family" as part of major social institution).

[101]Rawls, *supra* note 100, at 793.

[102]*Id.* at 790.

[103]Rawls himself provides that the contractors will "not know to which generation they [will] belong," RAWLS *supra* note 66, at 287, and "[a]mong the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. . . . The principles of justice are chosen behind a veil of ignorance." *Id.* at 12.

C. A Contractarian Methodology Applied to Family Governance

In the original position so amended, we can feel confident that the contractors would be concerned with issues of intrafamilial justice; knowing that the family has traditionally been a primary source of individual opportunity, status, and values,[104] self-interest will mandate attention to issues of justice among family members. Even if the contractors were willing to put aside their personal interests in ensuring just family governance, the public consequences of failure to live up to Rawls's assumption of altruism and justice would require their attention.

Theoretically, of course, the contractors might decide that the new society would do without families;[105] abolition of the family would ensure that issues of intrafamilial justice simply did not arise. But given their access to facts drawn from economics, psychology, and social organization, the contractors will know that the family, in one form or another, has been ubiquitous in human society and that it has served as both the prime agent of child rearing and the principal unit of economic organization.[106] They will also know that familial ties—of parent to child, wife to husband, brother to sister—have traditionally been the focus of most individuals' emotional lives. For all these reasons, it seems unlikely that our contractors would choose a society in which families do not exist.[107]

What would the contractors conclude with respect to family governance? In considering this question, it is important to keep in mind that the contractors act from self-interest. They are limited, however, in that they do not know what their real-life situation will be within the new society they are ordering. Because of this "veil of ignorance," they are "force[d] . . . to take the good of others into account."[108] Because they might be a husband, a wife, and a parent, they must consider the needs and interests of each. Because they do not know their gender, earning potential, or preferences for paid and household employment, they must take into account the interests of highly paid earners and homemakers, of both sexes.

Even without a veil of ignorance, the contractors should be deeply concerned with the position of children; indeed, one of the advantages of the Rawlsian methodology is that it lends itself so well to the inclusion of children within the governance model. Children's interests will be a prime concern to the contractors because of one simple fact: While half, more or less, will belong to each sex and

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[104]*See supra* notes 66–71 and accompanying text.

[105]JOHN RAWLS, POLITICAL LIBERALISM xxix (1993).

[106]John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 789 (1997); *see also id.* at 790–91 ("[W]e are not required to treat our children in accordance with political principles. . . . [T]he principles of justice impose constraints on the family on behalf of children who as society's future citizens have basic rights as such."); RAWLS, *supra* note 66, at 7 (describing "monogamous family" as part of major social institution).

[107]How would the family be defined? Here human societies have been far more various in their approaches. *See, e.g.*, MEAD, *supra* note 104, at 191 ("which women and which children are provided for is entirely a matter of social arrangements"). Would the contractors recognize cohabitants as families? How would they define parentage? These are important questions, given that the definition of the family unit will determine the group to whom the governance structure applies.

[108]*Id.* at 790.

many will become parents, every single one will be a child. Given the contractors' access to an empirical data base containing information drawn from psychology and sociology, they will also know that family relationships[109] and childhood experience[110] play a powerful role in shaping adult prospects. Both self-interest and the contractors' concerns as public citizens[111] should thus lead them to insist on governance principles that will ensure each child a fair opportunity of attaining a fruitful, self-selected adulthood; the structure of family governance, I would expect, will thus be more "child-centered" than has been traditional in our own society. The contractors will likely adopt a child-centered approach to parental rights[112] rather than one that emphasizes parental autonomy.[113] Certainly parental prerogatives—with respect to child care and discipline, education, medical care—would be limited as necessary to ensure children a full range of adult choices; the deference to parents' educational values found in *Wisconsin v. Yoder*,[114] for example, would not likely be favored.

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[109]For representative examples of the literature, see, for example, JOHN BOWLBY, A SECURE BASE: PARENT-CHILD ATTACHMENT AND HEALTHY HUMAN DEVELOPMENT (1988); MARGARET S. MAHLER ET AL., THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT (1975); SCIENTIFIC FOUNDATIONS OF DEVELOPMENTAL PSYCHIATRY (Michael C. Rutter ed., 1980); CLINICAL IMPLICATIONS OF ATTACHMENT (Jay Belsky & Teresa M. Nezworski eds., 1988); Glen H. Elder et al., *Problem Behavior and Family Relationships: Life Course and Intergenerational Themes* in HUMAN DEVELOPMENT AND THE LIFE COURSE: MULTIDISCIPLINARY PERSPECTIVES 293 (Aage B. Sorensen et al. eds., 1986); Seymour Epstein, *The Self-Concept: A Review of the Proposal of an Integrated Theory of Personality, in* PERSONALITY: BASIC ISSUES AND CURRENT RESEARCH (Ervin Staub ed., 1980).

[110]For example, children who reside in a single-parent households are more likely to experience poor health, behavioral problems, delinquency, and low educational attainment than are their peers in intact families; as adults they have higher rates of poverty, early childbearing, and divorce. For summaries of the research, see DONALD J. HERNANDEZ, AMERICA'S CHILDREN: RESOURCES FROM FAMILY GOVERMNENT, AND THE ECONOMY 58–64 (1993); S. Wayne Duncan, *Economic Impact of Divorce on Children's Development: Current Findings and Policy Implications*, 23 J. CLINICAL CHILD PSYCHOL. 444 (1994); Sara McLanahan, *Intergenerational Consequences of Divorce: The United States Perspective, in* ECONOMIC CONSEQUENCES OF DIVORCE: THE INTERNATIONAL PERSPECTIVE 285 (Lenore J. Weitzman & Mavis Maclean eds., 1992); Sara S. McLanahan et al., *The Role of Mother-Only Families in Reproducing Poverty, in* CHILDREN OF POVERTY: CHILD DEVELOPMENT AND PUBLIC POLICY 51 (Aletha C. Huston ed., 1991).

[111]The public costs of adverse childhood experience are high. Children in foster care, for example, which costs the taxpayer $15,000 to $30,000 per child per year, are overwhelmingly from fractured, impoverished homes. *See* DUNCAN LINDSAY, THE WELFARE OF CHILDREN 140, 149–53 (1994); MARK F. TESTA & ROBERT M. GEORGE, POLICY AND RESOURCE FACTORS IN THE ACHIEVEMENT OF PERMANENCY FOR FOSTER CHILDREN IN ILLINOIS (1988). Nor are the public costs of adverse childhood experience short-term. Failure to complete high school has alone been estimated to cost $250 billion in lower wages and forgone tax payments over the lifetime of each class of dropouts. NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 12–13 (1991).

[112]For descriptions of and commentary on this approach, see, for example, Bartlett, *Parenthood, supra* note 15, at 294–95; James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1374 (1994); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2405–14 (1995); Woodhouse, *supra* note 15, at 1827–44; John Bigelow et al., *Parental Autonomy*, 5 J. APP. PHIL. 183 (1988).

[113]For an example of a parent-focused approach, see FRIED, *supra* note 75, at 152 (arguing that "the right to form one's child's values, one's child's life plan and the right to lavish attention on that child [are] . . . extensions of the basic right not to be interfered with in doing these things for oneself").

[114]406 U.S. 205 (1972) (reversing parental convictions under compulsory school attendance law due to law's interference with defendants' free exercise and parental rights).

The contractors should also be concerned with children's economic entitlements. Family dissolution and nonsupport are currently major causes of children's poverty, welfare dependence and a range of other adverse consequence that may extend into adulthood.[115] While these outcomes do not result solely from reduced economic status, this factor appears to be the most important of the identifiable causes.[116] With this information in hand, I expect that the contractors would be extremely interested in child support.

Traditionally, child support law—like the spousal support rule on which Mrs. McGuire relied—has assumed parental income to be the property of the individual parent rather than the family unit.[117] I doubt that our selfish contractors, either as prospective children or public citizens, would approve this approach. Nor is such an approach consistent with the family's role in inculcating empathy and a sense of justice.[118] Of course, the contractors would also want their needs as potential support obligors to be taken into account; but future status as a support obligor is uncertain and should lead the contractors to favor equality among family members, rather than a rule preferring the noncustodial parent's interests to those of his child.

Putting these various concerns together, Rawl's conclusion that the contractors would select a "maximin" approach to the distribution of social resources,[119] permitting inequalities only to the extent that they benefit the least advantaged group, seems to be equally applicable to the problem of child support.[120] The maximin

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[115]*See, e.g.*, Mary Jo Bane, *Household Composition and Poverty, in* FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T 209, 231 (Sheldon H. Danziger & Daniel H. Weinberg eds., 1986) (concluding that "perhaps about 15 percent of all poverty could be alleviated by more attention to the allocation of resources after household splits"); Greg J. Duncan & Willard L. Rodgers, *Longitudinal Aspects of Children's Poverty*, 50 J. MARRIAGE & FAM. 1007, 1017 tbl. 5 (1988) (concluding that 14.9% of children's transitions into poverty resulted from loss of a parent from the home); *see also* Peter J. Leahy et al., *Time on Welfare: Why Do People Enter and Leave the System*, 54 AM. J. ECON. & SOC. 33 (1995) (reporting change in family structure as primary reason women enter welfare system).

[116]*See, e.g.*, SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 3, 79–94 (1994) ("Low income—and the sudden drop in income that often is associated with divorce—is the single most important factor in children's lower achievement in single-parent homes, accounting for about half of the disadvantage."); McLanahan, *supra* note 110, at 292–93, 298 (summarizing studies and concluding that "income explains more than half of the. . . . [child outcome] variation across family types"); *see also* Duncan, *supra* note 110 (reviewing research).

[117]*See* Garrison, *supra* note 78.

[118]As public citizens concerned about public expenditure, the contractors should also prefer a rule that requires parents, rather than the public, to provide for children's needs when possible.

[119]The shorthand description is Rawls's. *See* RAWLS, *supra* note 66, at 152.

[120]Rawls's conclusion that rational contractors would select a maximin approach is not uncontroversial. *See* John C. Harsanyi, *Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls's Theory*, 69 AM. POL. SCI. REV. 594, 600–01 (1975) (concluding that contractors would opt for principle of average utility); Roger E. Howe & Jon E. Roemer, *Rawlsian Justice as the Core of a Game*, 71 AM. ECON. REV. 880 (1981) (concluding that contractors exhibiting moderate degree of risk aversion would opt for unconstrained income maximization with floor constraint); *see also* DAVID GAUTHIER, MORALS BY AGREEMENT 14, 235, 264–65 (1986) (arguing that rational contractor would opt for Lockean proviso (principle that one must not better one's own situation through interaction that worsens the situation of another), the market, and a principle of "minimax relative concession," requiring that the greatest bargaining concession, measured as a proportion of the difference between the least the conceder might accept in place of no agreement and the most he might receive in place of being excluded by others from agreement, be as small as possible). But this controversy appears to be largely insignificant for

approach would yield something like an "equal outcomes" child support model—which aims at providing equal living standards for both portions of the separated family[121]—with income maximization incentives.[122] Certainly the contractors would forbid the "self-support reserve" feature of many current support guidelines, that—generally without regard to the child's or custodial parent's standard of living—permits (or requires) the court to award less child support when the support obligor's income falls below a statutorily defined limit (typically the federal poverty line);[123] such an approach clearly does not give equal regard to the claims of all family members. It is also possible that our selfish contractors would grant children an inheritance entitlement, at least when the other parent is not the primary distributee.[124]

What about marriage and divorce? Certainly the contractors would insist on formal gender equality; approximately 50% of them, after all, will belong to each sex. Gender neutrality—in economic entitlements and obligations, decision making powers, custody rights—would seem to follow. Assuming, with Rawls, that "the most

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purposes of child support policy. *See* Garrison, *supra* note 78.

[121]For descriptions of the equal outcomes model, see Judith Cassetty et al., *The ELS (Equal Living Standards) Model for Child Support Awards, in* ESSENTIALS OF CHILD SUPPORT GUIDELINES DEVELOPMENT: ECONOMIC ISSUES AND POLICY CONSIDERATIONS 329 (1987) [hereinafter ESSENTIALS OF CHILD SUPPORT]; Philip Eden et al., *In the Best Interest of Children: A Simplified Model for Equalizing the Living Standards of Parental Households, in* ESSENTIALS OF CHILD SUPPORT, *supra*, at 353; Isabel V. Sawhill, *Developing Normative Standards for Child-Support Payments, in* THE PARENTAL CHILD-SUPPORT OBLIGATION 79 (Judith Cassetty ed., 1983).

[122]This follows from the maximin principle itself, which sanctions income inequality benefitting the least advantaged group. Accordingly, inequality that could reliably be predicted to raise the living standard of both segments of the divided family would be preferred to pure equality. Such an effect might arise from an educational program or career shift that reduced current income but would likely produce a large gain in future income. But the most important reason for permitting income inequality is the problem of work (dis)incentives. The work incentives problem derives from the fact that, if each parent stands to lose a large portion of the benefit from new income—a result that the pure equal outcomes model logically requires—each parent's incentive to produce more income is markedly reduced. The maximin formula would sanction (indeed, require) modification of a pure equal outcomes model to create the work incentives needed to maximize aggregate family income. A number of commentators have rejected the equal outcomes approach because of its potential to create significant work disincentives. *See* Barbara Bergmann, *Setting Appropriate Levels of Child-Support Payments, in* THE PARENTAL CHILD SUPPORT OBLIGATION, supra note 121 at 116–17; Marilyn R. Smith & Jon Laramore, *Massachusetts' Child Support Guidelines: A Model for Development, in* ESSENTIALS OF CHILD SUPPORT, *supra* note 12, at 273 (same).

[123]Both the "income shares" and Melson formulae include a self-support reserve feature; one or another of these formulae are in use in more than 30 states. *See* Robert G. Williams, *Guidelines for Setting Levels of Child Support*, 21 FAM. L.Q. 281, 305 tbl. 4 (1987); *see also* DIANE DODSON & JOAN ENTMACHER, REPORT CARD ON STATE CHILD SUPPORT GUIDELINES 49–55 (1994) (describing and categorizing state rules). The Massachusetts and D.C. guidelines provide a self-support reserve for the custodial parent. *See id.* at 54.

[124]Louisiana is currently the only American state to grant children an inheritance entitlement, *see* DUKEMINIER & JOHANSEN, *supra* note 48, at 550, although recent scholarly commentary is critical of this approach. *See* Deborah A. Batts, *I Didn't Ask to Be Born: The American System of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HAST. L.J. 1197 (1990); Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83 (1994). Under the maximum principle, it would be necessary to limit inheritance rights so that "resulting inequalities are to the advantage of the least fortunate and compatible with liberty and fair equality of opportunity." RAWLS, *supra* note 66, at 277–78; *see also* ACKERMAN, *supra* note 76, at 202–08 (analyzing issue of inheritance in liberal state).

extensive liberty compatible with equal liberty for all"[125] would serve as one of the contractors' guiding principles, they should also prefer no-fault divorce to a restrictive divorce regime. Because of their relatively child-centered approach, the contractors might opt for more limited divorce grounds if a benefit to the couple's minor children could be shown. But the evidence on this point is in fact equivocal. Children in single-parent households are more likely to experience poor health, behavioral problems, delinquency, and low educational attainment than are their peers in intact families; as adults they have higher rates of poverty, early childbearing, and divorce.[126] But because the most significant factor in producing these poor outcomes is reduced economic status accompanying parental separation,[127] the new contractarian child support model might be expected to ameliorate them. And parental conflict within an intact family is also harmful to children.[128] Another problem here is simply that divorce law can only affect the legal termination of a marital relationship; even if the new divorce law could prevent spousal collusion in obtaining a divorce,[129] it cannot prevent consensual separation or nonconsensual desertion. Thus, without a clear basis for limiting adult family members' ability to exit an unwanted relationship, no-fault divorce would probably be applied across the board.

With respect to marital economic entitlements, our selfish contractors will want to maximize their own holdings. But they do not know whether they individually will acquire few assets or many; nor do they know whether they will disproportionately engage in unpaid childcare and household labor that benefits the family unit but limits individual asset acquisition. The contractors' child-centered perspective should also incline them toward a rule that does not discourage child care by parents. Given that the connection between child care/household production and the acquisition of assets/income would be confined to what we today think of as "marital" or "community" property,[130] the likely result of the contractors' deliberations would be rejection

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[125]RAWLS, *supra* note 66, at 60.

[126]*See* sources cited *supra* note 115.

[127]*See supra* notes 115–16, and sources cited therein.

[128]*See, e.g.*, WALLERSTEIN & KELLY, 49, 70–71 (reporting that children experience loyalty conflict and unhappiness as result of parental discord); Jay Belsky et al., *Patterns of Marital Change and Parent-Child Interaction*, 53 J. MARRIAGE & FAM. 487, 496 (1991) (reporting that quality of father-child relationship is frequently correlated with quality of father-mother relationship); E. Mavis Hetherington et al., *Play and Social Interaction in Children Following Divorce*, 35 J. SOC. ISSUES 26 (1979) (discussing adverse effects of divorce on child's play); Janet R. Johnston, *Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making*, 33 FAM. & CONCILIATION COURTS REV. 415, 420–21 (1995) (reviewing research and concluding that "ongoing and unresolved conflict between divorced parents has detrimental effects on children, especially boys," and that in these cases substantial access to both parents is associated with poorer adjustment); James L. Peterson & Nicholas Zill, *Marital Disruption, Parent-Child Relationships, and Behavior Problems in Children*, 48 J. MARRIAGE & FAM. 295 (1986) (discussing correlations between parents' post-divorce relationship and children's behavior); Marsha Kline et al., *The Long Shadow of Marital Conflict: A Model of Children's Postdivorce Adjustment*, 53 J. MARRIAGE & FAM. 297, 305 (1991) (discussing negative effects of parental conflict on children's post-divorce adjustment).

[129]*See supra* note 11.

[130]While marital and community property regimes differ in their details, all treat property acquired during marriage through the effort or wages of one spouse as the property of both spouses. Unlike community property regimes, a marital property system creates entitlements only when the marriage

of a title-based approach to property ownership in favor of a community or marital property regime.

Would the contractors opt for title-based, joint, or equal management of marital assets? Under the first option, the owner would have exclusive rights to use and manage the assets he or she "owns"; under the second approach, either spouse could use or manage community assets, without regard to title; under the final option, neither spouse could use or manage a community asset without the consent of the other. The management question brings us back to *McGuire*, although it is important to note that the management right Mrs. McGuire might assert under the new governance scheme differs from the support claim on which she actually relied.

We know that the contractors will want to maximize their holdings; we can also be confident that they would insist on a management principle that is gender neutral. But title-based, equal, and joint decision making all satisfy the gender-neutrality requirement; and, depending on which background risks and uncertainties one focuses, it is possible to make an asset-maximization case for each principle. Uncertainty about the extent of the contractors' individual acquisitions suggests a preference for equal or joint management. But uncertainty about their own and their future spouses' relative prudence or profligacy argues in favor of joint decision making. And the contractors' general preference for liberty suggests a preference for equal or title-based management. Given the lack of an obvious choice among management principles, the contractors should turn to their empirical data base for assistance in making a selection.

That data base would reveal, first of all, that financial control within marriage is typically determined by monetary contribution more than legal entitlement. Blumstein and Schwartz, who undertook a pioneering study of American couples during the early 80s, reported that three-quarters of time, it was money that established the balance of power in a relationship. Among both married couples and heterosexual cohabitants, women gained power when they earned more.[131]

The data base would also reveal that management of the family's day-to-day expenditures must be distinguished from management of the family's capital. Patriarchal family governance has typically been coupled with male control of capital

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terminates through divorce. For an overview of community property law, see ROBERT L. MENNELL & THOMAS M. BOYKOFF, COMMUNITY PROPERTY (1988). For an overview of marital property, see OLDHAM, *supra* note 58. If it could be shown that asset control tended to enhance asset production (I am skeptical that this could be shown in a familial context), then the maximin principle would suggest a more complex system in which the asset producing spouse obtains a larger fraction of the property he or she has brought into the marriage.

[131]BLUMSTEIN & SCHWARTZ, *supra* note 55, at 53–54, 309 ("Women who can support themselves can afford to have higher expectations for their marriages beyond financial security, and because they are more self-sufficient, they can leave if these are not met."); *see also* MAVIS MACLEAN, SURVIVING DIVORCE: WOMEN'S RESOURCES AFTER SEPARATION 21–22 (1991) (summarizing several research reports); JAN PAHL, MONEY AND MARRIAGE 169 (1989) (reporting that English husbands' greater earning power "continues to be associated with greater control over finances and greater power in decision making"); Burgoyne & Lewis, *supra* note 55 (reporting results of research showing that "inequality between spouses is still commonplace, with the husband more likely to have overall financial control and greater access to money for personal spending").

and female control of the day-to-day budget;[132] researchers have also reported an inverse relationship between the value of household income and the proportion managed by the wife.[133]

To flesh out these data, consider the case of Mr. Yoshida, described in the *New York Times* in an article recounting, in its author's words, "the contradiction between [Japanese women's] public powerlessness and private [familial] authority."[134] According to the *Times* account, Mrs. Yoshida told the reporter that her husband was capable of putting on his own underwear after stepping out of the bath —but no more.[135] Each day she picked out his clothes and "help[ed] him to put his shirt and trousers on as if he were a small child."[136] To the Times reporter, Mr. Yoshida's inability to get himself dressed in the morning represented a form of powerlessness; Mrs. Yoshida was the powerful parent, Mr. Yoshida the small child. We can question this interpretation; after all, Louis XIV did not dress himself in the morning either. But Mrs. Yoshida did clearly derive some power from her management of the household finances. While the Japanese wife is still legally prohibited from using a different surname from that of her husband and frequently walks behind him in public as a means of showing respect, she also typically keeps the household books and doles out an allowance to her husband.[137] One survey a few years ago apparently found that half of Japanese men were dissatisfied with the size of their allowances and that some have to plead with their wives for an advance.[138] Post offices, which serve as savings banks in Japan, typically refuse to allow withdrawals by a husband

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[132]Researchers have reported female management of the day to day budget among peasants and small farmers in preindustrial England and France. *See* ROBERT W. MALCOLMSON, LIFE AND LABOUR IN ENGLAND: 1700–1780 (1981); MARTINE SEGALEN, LOVE AND POWER IN THE PEASANT FAMILY: RURAL FRANCE IN THE NINETEENTH CENTURY (1983); KEITH WRIGHTSON, ENGLISH SOCIETY: 1580–1680 (1982); DAVID VINCENT, BREAD, KNOWLEDGE, AND FREEDOM (1981); Joan M. Jensen, *Cloth, Butter and Boarders: Women's Household Production for the Market*, 12 REV. RADICAL POL. ECON. 14 (1980). The net effect, according to one expert, "was to produce an economy in which typically women and children provided for daily living expenses on a cash basis, while the men handled the stock or field crops and used the income from that source to pay bills for rent, replacement stock, farm labor and so on. . . ." PAHL, *supra* note 131, at 33; *see also id.* at 29, 41.

The same pattern has been reported among industrial workers at the turn of the century, and in modern post-industrial societies ranging from the Britain and the United States to Japan. *See* Ellen Ross, *Survival Networks: Women's Neighbourhood Sharing in London Before World War I*, 15 HIST. WORKSHOP J. 4 (1983); Kate Mourby, *The Wives and Children of the Teeside Unemployed* 1919–39, 11 ORAL HIST. J. 56 (1983); A. John, *Scratching the Surface: Women, Work and Coal Mining in England and Wales*, 10 ORAL HIST. J. 13 (1982); BLUMSTEIN & SCHWARTZ, *supra* note 55; LILLIAN B. RUBIN, FAMILIES ON THE FAULT LINE 89 (1994) (noting that, among American working-class families, "even in families where husbands now share many of the tasks, their wives still bear full responsibility for the organization of family life").

[133]*See* PAHL, *supra* note 131, at 29, 33, 39–42 (stating that "the more resources a household owned, the more likely it was that the control would be in male hands").

[134]Nicholas D. Kristof, *Japan Is a Woman's World Once the Front Door Is Shut*, N.Y. TIMES, June 19, 1996, at A1.

[135]*See id.*

[136]*Id.*

[137]*See id.*

[138]*See id.*

without his wife's approval.[139] And, while cash machines might undermine the financial authority of wives, many apparently refuse to give their husbands a cash card for the family account.[140] The upshot of all this is that, for every Mrs. McGuire who might want a forum under our new governance scheme to litigate the issue of expenditure of marital funds for a capital purchase like a refrigerator, there may also be a Mr. Yoshida, who wants a larger beer and cigarette allowance from the basic household budget controlled by his wife.

What would our contractors do with all of this information? Certainly the result is not crystal clear. But I suspect that, in the end, the contractors would opt for a joint decision making principle for major economic decisions and an equal decision making principle for others.[141] This approach offers a reasonable level of self-protection to both the titled and nontitled spouse; it is democratic and egalitarian; it strikes a reasonable balance between the goals of autonomy and community; it is largely self-enforcing; and it leaves room for a "free and flourishing" family life that is not bound by legal rules.[142]

Ironically, while this result would appear to help Mr. Yoshida, it might not help Mrs. McGuire. Equal decision making with respect to minor financial transactions should enable Mr. Yoshida to buy more cigarettes and beer; he will not need a forum to litigate this issue. But, if joint decision making is applied to all "major" financial transactions, it might well preclude Mrs. McGuire from unilaterally making a large capital purchase such as indoor plumbing; under these circumstances, a forum to litigate the issue would be of no use to her. Defining "major" to mean only the most significant transactions—for example, those involving a real estate transaction—would help Mrs. McGuire.[143] But it would necessarily open the door to financial mismanagement and dissipation by imprudent spouses. In the end, the choice of a management principle thus appears to hinge on how one balances the practical

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[139]*See id.*

[140]*Id.*

[141]Community property regimes in the United States are not uniform in their treatment of property management, but most mandate spousal agreement for some major transactions involving community assets. *See* ARIZ. REV. STAT. 25-214(c) (1991) (either spouse may manage community property, but joinder is required for transactions involving real property or a transaction of guaranty, indemnity, or suretyship); CAL. FAM. CODE 1102 (1994) (both spouses must join in community real estate transactions); *see also* MENNELL & BOYKOFF, *supra* note 128; Carol S. Bruch, *Protecting the Rights of Spouses in Intact Marriages: The 1987 California Community Property Reform and Why It Was So Hard to Get*, 1990 WIS. L. REV. 731.

[142]It would logically be coupled with a judicial forum for relief, in the form of an accounting or an access order, for cases in which self-enforcement did not provide adequate protection of a spouse's interests. *See* Bruch, *supra* note 141, at 751–52 (describing provisions of Uniform Marital Property Act and California law authorizing enforcement by court order of requested accounting of ownership, beneficial enjoyment, access, or classification of marital property).

[143]Some community property states do restrict joint decision making to real estate transactions. *See, e.g.*, ARIZ. REV. STAT. § 25-214 (1991) (spouses have equal management rights with respect to community assets, except that "joinder of both spouses is required [for] . . . [a]ny transaction for the acquisition, disposition or encumbrance of an interest in real property other than an unpatented mining claim or a lease of less than one year [and] . . . [a]ny transaction of guaranty, indemnity or suretyship").

problems inherent in joint and equal management rather than basic "constitutional" constraints.[144]

I have pursued this issue at some length because it shows both the strengths and weaknesses of the contractarian methodology. The method provides some clear basic principles and makes use of empirical data. These are both significant advantages. The method's empirical bent is particularly important given family law's frequent reliance on social science data; I doubt that any methodology which ignored our accumulated knowledge about family life would be a useful means of constructing a model of family governance. But the contractarian methodology's desirable sensitivity to empirical data will sometimes produce uncertain results when the data is unavailable. Nor does the contractarian approach always offer bright-line demarcation of the line between basic structure and nonstructural issues. Finally, it does not obviate the need to exercise "fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."[145]

It is ironic that *McGuire*, the case with which we began our search for a fuller model of family governance, is difficult to clearly resolve even with that model in hand. It is possible, of course, that the new egalitarianism would influence behavior within the McGuire household without the need for legal sanctions.[146] But the contractarian methodology's inability to clearly resolve *McGuire* is nonetheless a weakness. Nor is *McGuire* unique. Child custody law, for example, is another area in which the contractarian approach does not appear to produce a certain outcome. Given the lack of clear benefits from any particular custody standard,[147] it is unlikely that the contractors would choose any custody rule, other than specifying formal gender equality.

The failure of a contractarian methodology to resolve every issue of family law does not, however, negate its value. Indeed, the incapacity of the model to resolve every issue may shed light on which issues are truly foundational. The model's reliance on empirical data may also help to build a family law research agenda. The contractarian methodology does not resolve every problem; it is not the only method which is useful. But it is nonetheless a provocative methodology that offers useful insights into both family governance and family law.

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[144]It is perhaps for this reason that there is considerable variation in the management rules of the various community property states. *See* J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56 LAW & CONTEMP. PROB. 99, 106–07 (1993) (categorizing state regimes and describing pros and cons of various management principles).

[145]Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting).

[146]*See supra* note 63 and sources cited therein.

[147]For evaluations of different custody standards, see David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984); Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2214 (1991); Robert Mnookin *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROB., Summer 1975, at 226; Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV 1 (1987).

IV. CONCLUSION

Families have governments; family governments are characterized by a significant level of state involvement; state prescriptions for family governance are embodied in family law, which lays out a kind of "constitution" describing the powers of family authorities and a "Bill of Rights" for family members. An awareness of this underlying governance scheme is useful because it can illuminate linkages between seemingly disparate areas of law; it can also provide a basis for evaluating specific legislative enactments and judicial pronouncements. But given the rapidity with which family law has moved toward an egalitarian, democratic model of family governance, the model embedded in current family law contains a significant number of gaps and inconsistencies.

A contractarian approach is an appropriate method of fleshing out a democratic governance model. It is highly compatible with our current tendency to view the family as a fluid set of relationships based on voluntary association as well as on status. It brings children to the bargaining table, without issues relating to their capacity. It permits us to rely on accumulated knowledge from other fields. It forces us to imagine, quite vividly, what it would be like to be those we are not. By focusing on the self-interested decisions of autonomous individuals it avoids inconclusive debate over slogans. It offers a well-developed and still vital tradition that underlies many of our political and social institutions. With these many virtues, the contractarian approach offers a useful and provocative method for developing a democratic, egalitarian model of family governance.