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Most people concede that there are times when state officials should intervene in the private family. Doctrines of family privacy are no longer thought to justify societal neglect of beaten wives or abused children. Yet society continues to use the ideal of the private family to orient policy. It seems important therefore to examine the concept of state intervention in the private family. In this essay, I argue that the private family is an incoherent ideal and that the rhetoric of nonintervention is more harmful than helpful.

Although most people accept in general the assertion that the state should not intervene in the family, they qualify the assertion with the caveat that the state should sometimes intervene in order to correct inequality or prevent abuse. I refer to this widely-accepted caveat as the "protective intervention argument" against nonintervention in the family.

This essay presents a different argument against the policy of nonintervention in the family. It suggests that the terms "intervention" and "nonintervention" are largely meaningless. The terms do not accurately describe any set of policies, and as general principles, "intervention" and "nonintervention" are indeterminate. I refer to this argument as the "incoherence argument."

A useful comparison can be drawn between arguments against a policy of nonintervention in the private family and arguments against a policy of nonintervention in the free market.[1] The pol-

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1. I originally drew this comparison in Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

icy of nonintervention in the free market, often referred to as laissez faire, was pursued by many American courts in the nineteenth and early twentieth centuries. The group of scholars known as legal realists played an important role in discrediting the legal theories that supported laissez faire. Their arguments form a useful contrast and resource for the arguments I present in this essay.

The protective intervention argument applies in a similar manner to both laissez faire and nonintervention in the family: whenever either the market or the family misfunctions, the state should intervene to correct inequality and protect the defenseless. The most common and easily accepted argument against laissez faire is that the free market sometimes breaks down or works to the serious disadvantage of particular individuals or groups; state intervention is then necessary to protect the interests of the weaker economic actors and of society in general. This parallels the protective intervention argument regarding the family. Sometimes the family misfunctions; instead of being a haven that protects and nurtures family members, the family may become a center of oppression and exploitation.[2] When this happens the state should step in to prevent abuse and to protect the rights of the individual family members. Both the market version and the family version of this protective intervention argument presuppose that it would be possible for the state to remain neutral, but present reasons that the state should not do so.

The incoherence argument against nonintervention in the family parallels the legal realists' argument against laissez faire. Both laissez faire and nonintervention in the family are false ideals. As long as a state exists and enforces any laws at all, it makes political choices. The state cannot be neutral or remain uninvolved, nor would anyone want the state to do so. The staunchest supporters of laissez faire always insisted that the state protect their property interests and that courts enforce contracts and adjudicate torts.[3] They took this state action for granted and chose not to consider such protection a form of state intervention. Yet the so-called "free market" does not function except for such laws; the free market could not exist independently of the state. The enforcement of property, tort, and contract law requires constant political choices that may

2. *See* Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. MICH. J.L. REF. 933, 948-50 (1985).

3. *See* Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 561-62 (1933).

benefit one economic actor, usually at the expense of another. As Robert Hale pointed out more than a half century ago, these legal decisions "are bound to affect the distribution of income and the direction of economic activities."[4] Any choice the courts make will affect the market, and there is seldom any meaningful way to label one choice intervention and the other laissez faire. When the state enforces any of these laws it must make political decisions that affect society.

Similarly, the staunchest opponents of state intervention in the family will insist that the state reinforce parents' authority over their children. Familiar examples of this reinforcement include state officials returning runaway children and courts ordering incorrigible children to obey their parents or face incarceration in juvenile facilities. These state actions are not only widely supported, they are generally not considered state intervention in the family. Another category of state policies is even less likely to be thought of as intervention. Supporters of nonintervention insist that the state protect families from third-party interference. Imagine their reaction if the state stood idly by while doctors performed non-emergency surgery without the knowledge or permission of a ten-year-old patient's parents, or if neighbors prepared to take the child on their vacation against the wishes of the parents, or if the child decided to go live with his fourth grade teacher. Once the state undertakes to prevent such third-party action, the state must make numerous policy choices, such as what human grouping constitutes a family and what happens if parents disagree. These choices are bound to affect the decisions people make about forming families, the distribution of power within the family, and the assignment of tasks and roles among family members. The state is responsible for the background rules that affect people's domestic behaviors. Because the state is deeply implicated in the formation and functioning of families, it is nonsense to talk about whether the state does or does not intervene in the family. Neither "intervention" nor "nonintervention" is an accurate description of any particular set of policies, and the terms obscure rather than clarify the policy choices that society makes.

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4. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923). *See* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1748-49 (1976).

I. THE PROTECTIVE INTERVENTION ARGUMENT

To understand the incoherence argument, it is useful to examine in more detail the protective intervention argument—the argument that nonintervention would be possible but is not always a good idea. The protective intervention argument is an argument in favor of selective intervention.[5] In exceptional situations, the state should intervene in the family to protect the interests of society and of the family members who may be at risk; aside from such exceptional situations, state intervention should ordinarily be limited to routine matters such as setting formal requirements for marriage licenses and providing public schooling for children.[6]

According to the usual version of the protective intervention argument, state intervention beyond routine matters should be carefully limited. Excessive or unnecessary intervention jeopardizes people's freedom and interferes with family intimacy. Because of the risks inherent in state intervention, say proponents of protective intervention, safeguards should be devised to protect against government abuse and to prevent unnecessary expansion of state intervention. As long as proper safeguards exist, however, state intervention can be useful—an important force for good.

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5. The protective intervention argument presupposes that the concept of state intervention in the family is coherent and meaningful. I argue that the concept is instead incoherent and meaningless.

First, it makes no logical sense to consider the policies referred to as "nonintervention" any less interventionist than many policies referred to as "intervention." By and large, policies supporting the status quo are referred to as nonintervention and attempts to change the status quo are called intervention; "intervention" and "nonintervention" are inappropriate and misleading terms to use to characterize these policies. Moreover, the policies referred to as "intervention" and "nonintervention" have a wide range of overlap; the same policy will be referred to as intervention by some and nonintervention by others. There is no objective or rational basis upon which to determine who is correct, because there is no logical basis for considering any particular set of policies nonintervention.

The protective intervention argument, however, presupposes that there is a basis for distinguishing intervention from nonintervention and that the terms have meaning. In my discussion of the protective intervention argument, I find it convenient occasionally to use the term "intervention" as though it had meaning. When I use the term, I intend for it to convey the range of contradictory meanings that people assign in everyday use of language.

6. As I argue *infra*, pp. 848-54, these "routine" matters can have an important influence on family roles and power relations within the family.

A. Families Can Malfunction

The argument in favor of selective state intervention is based on the notion that although families ought to be safe, supportive, and loving, some families at some times are not.[7] The family is supposed to be a warm, nurturant enclave governed by an ethic of altruism and caring—a haven protecting its members from the dangers of an authoritarian state and from the anarchistic intrusions of private third parties. Proponents of protective intervention recognize that in some unfortunate situations, the family can cease to be a haven and become instead, "a center of oppression, raw will and authority, violence and brutality, where the powerful economically and sexually subordinate and exploit the powerless."[8]

B. State Protection of Individuals

When a family malfunctions it may be important for the state to protect an individual from the private oppression that members of families sometimes inflict on each other. The protective intervention argument justifies state intervention in the family to protect children from abuse or serious neglect. State officials can remove children from their families if the children have been physically or sexually abused. In cases of child neglect, the state may send social workers into the children's homes or remove the children, temporarily or permanently, for their protection. Such state protection can include ordering medical care, even against the parents' religious scruples. These policies are generally considered to be a form of state intervention in the family, but accepted as intervention that is justified, indeed necessary.

Until recent years, state protection for battered wives was also considered state intervention in the family—again, perhaps justified intervention, but intervention nonetheless. The protective intervention argument characterizes such state protection as a

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7. A more radical strand of criticism might argue that the nuclear family is a seething hothouse or an oppressive structure that will *often* become destructive of individual members.

8. Minow, *supra* note 2, at 948. Professor Gerald Frug describes the city similarly as an enclave protecting individual freedom or alternatively a threat jeopardizing individual freedom. *See* Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1121 (1980). He suggests that "any form of group power intermediate between a centralized state and the individual" may have a precarious existence in a liberal political state. *See id.*

beneficial and necessary form of intervention into a family that has problems. Few people today would openly oppose state enforcement of rape and battery laws against spouses.[9] If providing shelter houses and legal aid to battered wives constitutes state intervention, many argue that such intervention is fully justified to protect individual wives from being oppressed by their husbands. In the exceptional cases in which families misfunction, the state should step in to protect the powerless.

This protective intervention argument begins to blend into the incoherence argument when people dispute whether such protection should be considered intervention at all. Some people would assert that when the family relationship has broken down, so has any justifiable claim to family privacy, and that state protection of the individual no longer constitutes intervention into the family. Indeed, proponents of this view might argue that it would be state intervention to try to keep the family together—for example, not to allow estranged spouses to get a divorce. In such arguments, the idea that the privacy of the family unit should be protected from state intervention begins to be replaced by the notion that what merits protection is the privacy of the individual regarding sexuality, procreation, and the formation of intimate, family-like relationships.[10] I consider this

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9. People struggling to eliminate the marriage exemption from rape laws tell me, however, that they find a great many people who *do* oppose the enforcement of rape laws against husbands. The National Clearinghouse on Marital Rape sent me a packet of newspaper clippings from all over the country that are filled with amazing quotations from state legislators. Opposition to marital rape laws range from assertions that "sex is part of the [marriage] contract," Tex. Rep. Patricia Hill, *quoted in* the Times-Herald, May 21, 1985 (Dallas, Tex.), and "I don't know how you can have a sexual act and call it forcible rape in a marriage situation," Alaska Sen. Paul Fischer, *quoted in* Daily News, Mar. 21, 1985 (Juneau, Alaska), to concerns with false charges and "blackmail." Legislators argue that the "state shouldn't be going behind the bedroom doors." Tex. Rep. Patricia Hill, *quoted in* Times-Herald, *supra*. *See also* S.D. Rep. Joe Barnett, *reported in* Argus Leader, Mar. 2, 1985 (Sioux Falls, S.D.) (keep government out of the bedroom). Spousal rape laws are "an absolute intrusion into family life," S.D. Sen. Thomas Ruby, *quoted in* Capital Journal, Mar. 15, 1985, (Pierre, S.D.). They would pit family members against one another, S.D. Rep. Bernie Christenson, *reported in* Capital Journal, Feb. 14, 1985 (Pierre, S.D.) and "erode at family life," S.D. Sen. Harold Halverson, *quoted in* Argus Leader, Feb. 28, 1985 (Sioux Falls, S.D.). "I still believe in the old traditional bond of marriage." Alaska Sen. Paul Fischer, *quoted in* Daily News, *supra* (copies of all clippings on file with U. MICH. J.L. REF.).

10. This shift from the concept of a private family into which the state should not intervene to the concept of individual privacy regarding intimate relationships corresponds to a more general shift I have referred to as the "liberalization of the family." *See* Olsen, *The Politics of Family Law*, 2 LAW AND INEQUALITY 1, 6-8 (1984). There I discuss the shift that has taken place from seeing the family as an organic group to seeing it as a contract among individuals. *See id.* at 11-12.

For an argument that this individual privacy right should be grounded in individual autonomy and not in marriage and family, see Eichbaum, *Towards an Autonomy-Based*

concept of individual privacy to be part of the protective intervention argument—that state intervention is sometimes justified—because although the privacy argument redefines state intervention, it still considers intervention and nonintervention coherent, meaningful concepts.

C. *Safeguards Against Excessive Intervention*

The protective intervention argument usually treats nonintervention as the norm and intervention as an exception.[11] As one jurist put it: "The normal behavior of husband and wife or parents and children towards each other is beyond the law—as long as the family is 'healthy.' The law comes in when things go wrong."[12]

People who support selective state intervention often assert that safeguards are necessary to protect families from excessive state intervention—attempts by the state to offer protection when it is not really necessary. Child abuse and neglect statutes typically provide that until behaviors pass some threshold, the family is to remain private and the state should not intrude. The Constitution has been held to supply additional protection to family privacy by requiring a clear and convincing showing of abuse or neglect before parental rights may be severed.[13] Physical or sexual abuse or serious neglect is usually necessary to trigger state intervention. This possibility of state intervention, even if it actually occurs only in rare exceptional cases, can play a significant role in keeping family behavior within reasonable bounds of decency.[14]

Divorce or legal separation may also be considered a sufficient trigger to justify state intervention that would otherwise not be allowed. For example, many people who would oppose such policies in an ongoing family believe that if parents separate, the

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Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy, 14 HARV. C.R.-C.L. L. REV. 361 (1979).

11. A more radical version of the protective intervention argument might maintain that state intervention is frequently or always necessary to protect individuals from the inherent oppressiveness of the nuclear family. *See supra* note 7.

12. Kahn-Freund, *Editorial Foreword* to J. EEKELAAR, FAMILY SECURITY AND FAMILY BREAKDOWN at 7 (1971), *quoted in* Freeman, *Violence Against Women: Does the Legal System Provide Solutions or Itself Constitute the Problem?*, 3 CAN. J.F.L. 377, 387 (1980).

13. Santosky v. Kramer, 455 U.S. 745, 768-70 (1982).

14. The possibility of state action in more extreme cases can have a significant influence on everyday behavior within the family. *See, e.g.*, Minow, *supra* note 2, at 952-53.

state should order the noncustodial parent to provide financial support for his or her child in case the parent would not do so without a court order.[15] As long as they see safeguards, such as thresholds of family misbehavior or breakdown, to protect against excessive intervention, most people today support a certain level of protective intervention by the state.

II. THE INCOHERENCE ARGUMENT

The incoherence argument goes further and I believe is more fundamental than the protective intervention argument. The protective intervention argument treats nonintervention as a fully possible but sometimes unwise choice; the incoherence argument questions the basic coherence of the concepts intervention and nonintervention. The state defines the family and sets roles within the family; it is meaningless to talk about intervention or nonintervention, because the state constantly defines and redefines the family and adjusts and readjusts family roles. Nonintervention is a false ideal because it has no coherent meaning.

For example, suppose a good-natured, intelligent sovereign were to ascend the throne with a commitment to end state intervention in the family. Rather than being obvious, the policies she should pursue would be hopelessly ambiguous. Is she intervening if she makes divorces difficult, or intervening if she makes them easy? Does it constitute intervention or nonintervention to grant divorce at all? If a child runs away from her parents to go live with her aunt, would nonintervention require the sovereign to grant or to deny the parents' request for legal assistance to reclaim their child? Because complete agreement on family roles does not exist, and because these roles undergo change over time, the state cannot be said simply to ratify preexisting family roles. The state is continuously affecting the family by influencing the distribution of power among individuals.

The incoherence argument is more complex with regard to the family than with regard to the market. Because nonintervention in the family has been understood as a variety of things, demon-

15. *Compare, e.g.*, Anderson v. Anderson, 437 S.W.2d 704 (Mo. Ct. App. 1969) (ordering divorced father to pay for daughter's college education) *with* Roe v. Doe, 29 N.Y.2d 188, 272 N.E.2d 567, 324 N.Y.S.2d 71 (1971) (refusing to order father to support daughter's college education). In McGuire v. McGuire, 157 Neb. 226, 59 N.W.2d 336 (1953) the court refused to order spousal support for the wife in an ongoing marriage, although the circumstances of the parties were such that the court might well have awarded spousal support had there been a legal separation.

strating its incoherence becomes more complicated than demonstrating that laissez faire is incoherent with respect to the market. Laissez faire is incoherent because no apolitical or neutral way exists to enforce property, contract, or tort law; once the state undertakes to enforce any of these laws, courts are forced to make political choices that cannot help but have important effects on the market and on the direction of economic activities. The alternative of not enforcing any property, contract, and tort law—creating a "state of nature"—is unacceptable in the marketplace. Once one rules out a state of nature, the government can no longer keep "hands off" the market; the question becomes simply which particular policies the government shall support.

The greater complexity of the incoherence argument with respect to the family than with respect to the market makes it initially easier to see that the state is not a neutral arbiter when it deals with the family. Historically, the state bolstered the power of the father over his family. A policy-based refusal to bolster this power might well be considered "intervention"—whether justified under the protective intervention argument or considered obtrusive and unjustified.[16] Even today the state is often expected to enforce parents' authority over their children. To many who endorse hierarchical family relations, "nonintervention" seems to mean simply state support for the family member with power. "Nonintervention" loses much of its appeal if one thinks of it as mere reinforcement of the status quo. Moreover, because the status quo undergoes continual change, nonintervention in the hierarchical family cannot be coherent. Even if state officials attempted simply to support the status quo they would still be forced to make political choices that have important effects on the distribution of roles and power within a family.

In recent years, the state has been expected to treat the members of the family—especially the husband and wife—more as equals. With increasing juridical equality within the family, the parallel between laissez faire with respect to the market and nonintervention with respect to the family becomes closer. Complete juridical equality would require a new concept of state intervention and nonintervention. At least two radically different concepts are possible, though neither would be acceptable to most people and, as I will demonstrate, neither is coherent. One possibility, which I refer to as the Market Model, is based on

16. *See infra* p. 850.

enforcement of all laws, just as they are enforced in the market. Under this model, all rights and obligations would be enforced between family members the same way laws are enforced between strangers. In this manner the state could avoid direct support for family hierarchy. Nonintervention under the Market Model would be incoherent for the same reasons laissez faire is incoherent: enforcement of any property, tort, or contract law, whether between family members or strangers, requires political choices that necessarily affect the power of the individuals and groups involved and the direction of both their intimate and their commercial relations.

A second possible model of state "nonintervention" in a juridically equal family is non-enforcement or delegalization—no rights or obligations to be enforced between family members. I refer to this construct as the State of Nature Model. Unlike the situation regarding the market,[17] something approaching this model is acceptable to many as a form of "nonintervention" in the family. It can be demonstrated, however, that nonintervention under the State of Nature Model is also incoherent. First, because the "state of nature" would exist only within the family, the state would have to decide the boundaries of family. In addition, if the state of nature within the family were partial instead of complete, the state would have to decide which rights and obligations it would enforce within the family. These decisions require political choices that necessarily affect the roles and power within a family. Once the state undertakes to enforce some but not all rights and obligations, the state cannot avoid policy choices that will affect family life. No logical basis exists for identifying these state choices as either intervention or nonintervention.

A. Introduction: Laissez Faire and Nonintervention

As I have suggested, the incoherence argument against nonintervention in the family is both simpler and more complex than the corresponding argument against laissez faire in the market. An important claim of laissez faire was that the state could and should treat market actors as juridical equals and enforce even-handedly uncontroversial neutral ground rules that would en-

17. In the market, virtually no one would find a state of nature acceptable. People insist that some form of tort, contract, and property law be enforced. *See supra* p. 836.

sure the protection of all.[18] The incoherence argument against laissez faire demonstrated that the ground rules were not and could not be made neutral and that they could not be enforced even-handedly. Opponents of laissez faire showed that policy issues arose constantly within every aspect of tort and contract law doctrine—that the kind of apolitical legal system that laissez faire envisioned and depended upon was a myth.[19]

In the case of the market, laissez faire seemed at least to produce a kind of state neutrality, because courts treated people as juridical equals. Workers and bosses were said to have identical rights to freedom of contract.[20] Legal formalism or conceptualism presupposed that it was possible for a legal system to be rational, objective, and principled—scientific rather than political. The failure of legal formalism or conceptualism rendered laissez faire incoherent.[21] Had it really been true that law could be apolitical, that contract law could simply enforce the will of the parties, and tort law simply require those at fault to compensate their victims, laissez faire might well have been coherent.[22] No one has come up with any plausible method for removing the need for political choice from law, however, and I consider it highly unlikely that any such method exists or could be devised.[23]

B. Nonintervention and the Hierarchical Family

The notion of nonintervention in the family is in a sense less plausible than laissez faire in the market. The ideal laissez-faire state would treat market actors as juridical equals; the state does not treat members of a family as juridical equals. Further,

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18. I refer to laissez faire in the past tense because I am speaking of its classical form, which came to seem implausible many years ago. *See* Kennedy, *supra* note 4, at 1746-48.

19. *See id.* at 1748-49.

20. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 52-58 (1905).

21. *See* Kennedy, *supra* note 4, at 1731-32.

22. Under these circumstances, the incoherence argument would fall, and the important question would be the one raised by the protective intervention argument—whether the free market led to injustice and needless suffering in particular cases that could properly be relieved through selective state intervention.

23. My agnosticism regarding the possible existence of an apolitical jurisprudence is based primarily on the difficulty of proving a negative. It is relatively easy to show that particular attempts to ground judicial decision-making on apolitical bases fail—for example, that the law-and-economics field does not offer such a basis, *see* Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980) (arguing that law-and-economics claims to present such an apolitical basis but cannot)—but it would be very difficult to prove that all possible attempts are bound to fail.

the constitutive role of law in creating the market is less obvious than law's constitutive role in creating and defining the family. Laws establish who is married to whom and who shall be considered the child of whom.

The existence of this "legal-positivist" view of the family should not, however, obscure the coexisting and competing "natural law" belief that the family exists as a natural human formation, not created but merely recognized (or not recognized) by the state. Such a notion is implicit in the sense shared by most of us that some families exist that are not legally recognized. In fact, a great deal of family law doctrine can be seen as a response to the problems caused by the disjunction between legally recognized or de jure families and "natural" or de facto families—the gap between the legal definition of family and the sense people have of what a family really is.[24]

Although the state defines and reinforces specific roles and a particular hierarchy within the family, these policies are often considered nonintervention; indeed, a refusal to bolster family hierarchy has sometimes been considered state intervention in the family.[25] The idea that the state can intervene or not intervene in the family, and particularly that the state practices a policy of nonintervention when it bolsters family hierarchy, would seem to depend upon the belief that a natural family exists separate from legal regulations, and that the hierarchy the state enforces is a natural hierarchy, created by God or by nature, not by law.[26]

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24. Common law marriage, putative marriage, and a variety of presumptions that legitimate bigamous second or third marriages all serve to enable courts to treat established (real) families like legal families. *See also, e.g.*, Stanley v. Illinois, 405 U.S. 645, 651-52 (1972) (invalidating state law denying unwed father legal rights of parent); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 75-76 (1968) (limiting state's discretion to base wrongful death law on legal rather than biological relationships).

25. *See infra* p. 850.

26. In response, it might be argued that the state can adopt a meaningful policy of "nonintervention" even towards a "family" that it plays the major part in defining. Proponents of this view might acknowledge that their policy of selective nonintervention departs from the literal meaning of the term but assert that a distinction between the roles the state must play before the family can be legally recognized and other roles it might play lends coherence to their use of the term. On this view, the state plays one role as ground rule maker—policing the borders of the definition of "family" and protecting that family from intruding third parties. This role might be said to be sufficiently noncontroversial that it may be distinguished from numerous other roles—such as providing contraception or abortion—that the state may choose to avoid under a policy of "nonintervention."

The standard and most obvious difficulty with this approach appears when one tries to select which functions are so "noncontroversial" that they come within the state's role as ground rule maker, and which functions are objectionable enough that the state should abjure them under its general policy of "nonintervention." While there may be some

1. The concept of a natural family— Last century the idea that wives were naturally dependent upon their husbands was believed by some people as firmly as the idea that children are naturally dependent upon their parents is believed now. The state was expected to bolster the husband's power over his wife whenever it was threatened. The husband chose the family domicile and the wife was essentially forced to live there, just as children are today. As expressed in a nineteenth-century treatise on domestic relations: "The domicile of the wife follows that of the husband; the domicile of the infant may be changed by the parent. Thus does the law of domicile conform to the law of nature."[27] Natural law or "Divine Providence" was thought to be the origin of our laws regarding the family.[28] "[P]ositive law but enforces the mandates of the law of nature, and develops rather than creates a system."[29] Although there have been changes in what is considered natural within the family, the basic notion that family relations are natural relations has not changed that much. Today women may no longer be considered naturally dependent on their husbands, but children are still considered naturally dependent on their parents.[30]

A similar concept of a natural family finds expression in constitutional law. At least since 1944, the Supreme Court has recognized a constitutionally-protected right of family privacy—a "private realm of family life which the state cannot enter."[31]

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functions—for example, requiring blood tests of marrying couples—that most would agree fit the first category, the great bulk of decisions will be objectionable to a number of putative "family" members. Given the inevitability of substantial disagreement over which family policies are neutral ground rules and which are objectionable intervention, labelling any such set of policies "nonintervention" robs the term of any sensible meaning. These family policies in fact arise from politics and do not flow logically from neutral principles.

A second and more fundamental difficulty defeats the project of distinguishing the establishment of neutral ground rules from other state activities. Any ground rules that are sufficiently noncontroversial that they might plausibly be considered neutral would be too general to settle concrete disputes. Policies may well be internally consistent but still be indeterminate. No policies "flow logically" from principles, even if principles could be neutral. This argument parallels the arguments of some legal realists that laissez faire was incoherent because the state could not enforce even-handedly uncontroversial neutral ground rules. *See supra* pp. 844-45.

27. J. SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS § 3, at 9 (5th ed. 1895). The author later criticizes as "judicial interference" the policy of some courts to relieve the wife of her obligation to follow her husband where his choice of domicile is unreasonable. *See id.* § 38, at 69.

28. *See id.* § 3, at 8.

29. *Id.* § 2, at 5.

30. *See infra* pp. 851-52 & note 46.

31. Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The right to family privacy is often traced back to Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Society of

The source of this family privacy has recently been said to be "not in state law, but in intrinsic human rights."[32] The Supreme Court clearly envisions a concept of family relationship that is not dependent upon state law: "Nor has the [Constitution] refused to recognize those family relationships unlegitimized by a marriage ceremony."[33] The family has its "origins entirely apart from the power of the State."[34] Thus, for purposes of constitutional adjudication, "[t]he legal status of families has never been regarded as controlling."[35] The nineteenth century concept of a natural family has continued into the twentieth century. We now recognize law's important role in creating the nineteenth-century family. I would hope we will not have to wait until the twenty-first century to recognize the constitutive role of law in the twentieth-century family.

2. *State enforced hierarchy: Not intervention?*— Nonintervention would seem to have meaning against a backdrop of preexisting prescribed social roles within the family. State-created background rules shape and reinforce these social roles by assigning power and responsibility within the family. These background rules are not usually thought of as state intervention, but they implicate the state in the prescribed family roles and undermine claims of nonintervention. The setting of the roles requires political choices that can hardly be considered nonintervention. The state whose policy choices have had such a great effect upon these family roles certainly cannot be considered neutral, nor should the label "nonintervention" be used to conceal or confuse the political nature of the choices society makes.

Moreover, the enforcement of these family roles, which is what many people mean by "nonintervention," requires the state to make continual policy choices about the scope and

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Sisters, 268 U.S. 510 (1925). *Meyer* invalidated a statute that forbade the teaching of any modern language other than English in the first eight grades, and *Pierce* overruled a law that required children to attend public schools. Both statutes were found to be unwarranted intrusions into parents' liberty to raise their children. The cases were decided on the basis of the individual right to liberty, once granted substantive protection by the due process clause of the fourteenth amendment. Although the Court has abandoned many of its substantive due process cases from the same period, it has reaffirmed *Meyer* and *Pierce*. *See Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1157, 1161-63 (1980).

32. Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977) (footnote omitted).

33. Stanley v. Illinois, 405 U.S. 645, 651 (1972). The *Stanley* Court was dealing with the biological father-child relationship, but it also emphasized Mr. Stanley's role in *raising* his children.

34. Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977).

35. *Id.* at 845 n.52.

meaning of the roles it is enforcing. The content of family roles has changed over the years and there has never been complete agreement about the authority husbands and parents have over wives and children or about the responsibilities that go along with the authority. State officials must determine borderline questions about the nature and extent of family hierarchy on a case-by-case basis, and pursuing a policy of "nonintervention" cannot relieve state officials from having to make ad hoc political decisions about the family.

a. The Family Head Model: Direct empowerment of superior— Last century some people believed that by empowering the head of the family—the husband and father—to act for the family and to settle intrafamily disputes, the state could avoid intervening in the family. I refer to this policy as the Family Head Model. In theory, this model would relieve the state of making case-by-case decisions regarding the family.

During the early nineteenth century, the husband was the juridical head of the family, entitled to control the wife and children. He was also the financial head of the family. The common law, enforced by the state, provided that a wife's property belonged to her husband. Any personal property to which the wife held legal title was transferred automatically, by operation of law, to her husband; and the husband was given a life estate in her real property.[36] He was entitled to the services of his wife and children. If they received wages, these wages belonged to him; even if they worked without pay, the father could recover the value of services they provided to third parties.[37] Although he could not legally sell the sexual services of his wife and minor

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36. This dramatic imposition was not considered state intervention. The transfer of the wife's property was sometimes characterized as a "gift," *see* J. SCHOULER, *supra* note 27, § 80, at 132, but the wife had no choice about conferring it. Even if the couple agreed that the wife could keep her property, their contract would have been invalid. Complicated rules applied to certain incorporeal interests of the wife. The husband's title to choses in action and certain real property interests was considered conditional and he would have to complete certain acts in order to appropriate the choses to himself or to carry out his right of reduction into possession. *See id.* §§ 80-159, at 131-248.

37. *See* Benson v. Remington, 2 Mass. 113 (1806) (ordering neighbors who had allowed a teenager to live with them to pay her father wages for the value of the services she performed or might have performed for them). Probably the neighbors would not have resisted the father's claim and appealed the decision in his favor had it not been for the peculiar facts of the *Benson* case. Several years before, the father had abandoned his family and left them in "extreme poverty." *Id.* at 113. The neighbors found the daughter in a "very helpless condition," *id.*, and took her into their home. Three years before he brought the lawsuit, the father had returned and made a similar demand of money from the neighbors, but community pressure forced him to compromise his claim. This history suggests that in the *Benson* case, the state was empowering the father and not just enforcing the agreed norms of society.

daughters, he could recover money from any man who had sexual intercourse with them without his permission.[38] Some people objected to these policies, but there is no evidence that anyone considered the policies state intervention.

Moreover, the nineteenth-century concept of nonintervention might require the state to bolster the authority of the father. If the wife were to leave and take the children with her, the courts would ordinarily be expected to grant a habeas corpus writ ordering her to return them to him. For courts to refuse to issue such a writ would be considered state intervention in the family.[39]

Today courts are less expected to bolster the power of the husband over the wife, but they are still expected to reinforce parents' authority over children. Many states have a procedure whereby courts can label a child "incorrigible" or "in need of supervision" and order the child to obey the parents or be locked up in the functional equivalent of jail.[40] Parents also have considerable power over whether their child will be institutionalized as mentally defective or troubled.[41] My point is not that such situations are very common, but that these state policies that empower parents are not considered state intervention in the family.

In more subtle ways, also, the state directly authorizes parents to act on behalf of the child. The parents are empowered by the state, as well as by custom, to name the child and to change its name if they wish. They determine the state of which the child shall be a legal citizen. They enroll the child in school. These powers are established by state regulations, regulations that define family roles but are hardly noticed and certainly not considered state intervention.

b. Creating economic dependence— The social interaction within a family can be significantly affected by the economic dependence of wives on husbands and of children on parents. It is obvious to us today that laws and regulations in force early last century made the wife economically dependent upon the husband, and an adolescent economically dependent on his father,

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38. The husband's action would be for "criminal conversation" if the man had intercourse with his wife and for loss of services if with the daughter. Many commentators have considered this action for loss of the daughter's services to be a legal fiction that allowed the father to recover for his loss of honor or hurt feelings.

39. *See* Olsen, *supra* note 1, at 1505 & n.30.

40. *See* Katz & Teitelbaum, *PINS Jurisdiction, the Vagueness Doctrine, and the Rule of Law*, 53 IND. L.J. 1 (1977-1978).

41. *See* Parham v. J.R., 442 U.S. 584, 600-04 (1979).

typically until age twenty-one. Neither married women nor minors could carry on a trade or business except under the authority of the husband and father; their services belonged to him and he could collect any wages they might earn. Last century this dependency seemed natural to many people.

Today the state's role in reinforcing economic dependency is less obvious but it is still significant. Although state laws no longer require women to perform unpaid work for their husbands as part of the marriage contract, as in previous centuries, federal tax laws still provide a significant economic incentive for domestic labor to remain unpaid.[42] An additional basis for women's economic dependency is low pay; statistically, women's wages are only sixty-one percent of men's.[43] Although state laws that in the past encouraged or required sex discrimination in employment have been preempted by federal antidiscrimination laws,[44] a number of government agencies save many thousands of dollars by paying lower salaries for jobs held mainly by women than for jobs of comparable worth that men perform.[45]

A child's economic dependence on her parent reinforces and increases the parent's power over the child. Although young children might not be capable of independence,[46] as children grow

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42. If a taxpayer pays to have housework done, the cost is generally not a tax deduction. If, however, he marries someone who keeps house for him, he can file a joint return with her and they need not include as income the value of her housekeeping services. Or, suppose two taxpayers each did paid housework for the other. Their tax liabilities would be greater than if they each did their own housework.

43. NATIONAL COMMITTEE ON PAY EQUITY & NATIONAL INSTITUTE FOR WOMEN OF COLOR, WOMEN OF COLOR AND PAY EQUITY, *reprinted in Women in the Workforce: Pay Equity: Hearings Before the Joint Economic Committee*, 98th Cong., 2d Sess. 190, 198 (1984).

44. *See* Olsen, *supra* note 1, at 1548, 1555-59.

45. A number of state governments have undertaken studies and have found that it would be very expensive to enact a program of "comparable worth." Thus they would seem to be reaping a significant economic benefit from taking advantage of women's lower pay. In AFSCME v. State of Washington, Nos. 84-3569, 84-3590 (9th Cir. Sept. 4, 1984) (available September 18, 1985 on LEXIS, Genfed Library, Cases file), the Ninth Circuit struck down a District Court decision that would have required Washington State to make comparable worth payments.

46. It is easy to assume that young children are naturally dependent on their parents. Upon closer examination, however, this assumption seems unjustified. Certainly, human offspring would appear to be as defenseless as other primate young, and in this sense can be said to be naturally dependent. But, in this sense, children would be naturally dependent upon their mother, possibly on their father, and probably upon the larger community. In many parts of the world a mother and infant or a mother, father, and infant could not survive alone.

In civilized society, young children remain dependent. That this dependency is on the child's *parents* is surely based on laws. Laws ensure that most children remain with their parents, although in spite of the law, large numbers of children are separated from their parents. Presumably more children would be taken from their parents were it not for the

older, their dependence is increasingly attributable to state regulations. Child labor laws, however wise as policy, are state regulations that make it difficult for children to gain economic independence.[47] And the state goes further. State laws not only limit a child's opportunity for paid employment, they also require her to attend school—work for which she receives no pay.[48] Finally, when a state pays welfare benefits for a child or orders one parent to pay support for a child, the money does not go to the child herself, but to a custodian, usually the other parent. This maintains the child's economic dependency on her custodian. If we are concerned about the state intervening in the family if it provides free contraceptives to girls without telling their parents, we should not overlook the fact that state policies have made it difficult for girls to pay for contraceptives or to get them any other way.[49]

c. Eliminating alternative sources of support or nurturance— Last century a woman was required to live in the home of her husband. He could choose to live anywhere, and she was obliged to follow him. One method of enforcing this requirement was to eliminate alternative living possibilities. Anyone who offered lodging to a runaway wife could be charged with harboring her. Although her father might, as a practical matter, get by with this infraction, it would be difficult for anyone else to do so. Most women would be unable to help her and most men ill-advised to do so.[50] If a runaway wife formed a close relationship with a man, they could be suspected of adultery and treated very harshly. If she actually had sexual relations with another man, she could be recaptured and forced home by her

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legal (as well as social) disapproval of kidnapping.

Moreover, the period of dependency could be considerably shortened if, for example, property laws were not enforceable against children. One could have a society in which children were allowed to take whatever they needed and to eat food they found as freely as many children eat at home. My point is not that this plan would produce a better society or healthier children, but simply that it would be possible.

47. *See, e.g.*, CAL. LABOR CODE §§ 1290-1311 (West 1971 & Supp. 1985); Youth Employment Standards Act, MICH. COMP. LAWS §§ 409.101-.124 (1979) (restricting and regulating the hours and types of employment for minors).

48. *See, e.g.* Compulsory Education Law, CAL. EDUC. CODE §§ 48200-48324 (West 1978 & Supp. 1985); Michigan Compulsory School Attendance Law, MICH. COMP. LAWS ANN. §§ 380.1561.-1599 (West 1979). Of course, it can be argued that school attendance is non-productive labor and should be considered a benefit rather than a burden. In some societies, however, being a student is considered gainful employment and people are paid to attend school. My point is simply that these state policies are not natural or inevitable and they implicate the state in the economic dependency of youngsters.

49. *See infra* p. 860; Olsen, *supra* note 1, at 1506 & n.33.

50. *See* J. SCHOULER, *supra* note 27, § 41, at 71-72.

husband.[51] The husband could bring a civil suit and recover money damages from the man for "criminal conversation." The husband would continue to own his wife's property and to be entitled to her services, but he would no longer have to support her. In many cases he could take their children away from her and perhaps even bar her from visiting them.[52]

Today the state will ordinarily not penalize third parties who offer lodging or friendship to a woman without the permission of her husband, but laws continue to penalize those who offer the same to children without the permission of their parents. The state is implicated in the power and role distribution within the family when its laws prevent children from looking to third parties for support. Yet the state is not accused of intervening in the family when it forces children to live with their parents or when it prohibits doctors from treating minors without the parents' knowledge and approval. The child may be required to associate or forbidden from associating with people, at the whim of the parents. Statutes permitting courts to issue grandparent visitation orders that may limit this parental prerogative in certain egregious cases are themselves sometimes criticized as state "intervention" in the family.[53] The state gives parents considerable coercive power over children and then characterizes its refusal to monitor this power as "nonintervention."

d. Limiting state protection— Last century the father was permitted to discipline his wife and children, and this permission often extended to corporal punishment. Behavior that would constitute a criminal offense if directed at a stranger was fully legal against one's children and mere grounds for separation or divorce if directed against one's spouse. Doctrines of intrafamily tort immunity protected the husband and father from civil suits by his beaten wife or children.[54]

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51. *See id.* § 45, at 76. If a husband discovered his wife in bed with another man and killed them, his crime would be a misdemeanor, not a felony. *See id.* § 45, at 76, n.5.

52. Lord Talfourd's Act, an 1839 reform bill in England that gave courts power to grant mothers child custody and visitation, specifically excluded from its provisions adulterous mothers; and some Lords who opposed the bill still argued that the *risk* that an adulterous mother could benefit from the reform if her adultery could not be proven was so unacceptable that the bill should be defeated. *See* 44 PARL. DEB. (3d ser.) 772, 789 (1838).

53. *See, e.g.*, Olds v. Olds, 356 N.W.2d 571, 574 (Iowa 1984). In some situations, grandparent visitation orders may coerce a child to continue unwanted contact with the grandparents.

54. The same doctrine would, of course, protect the wife and child from civil suit if they were to assault or batter the husband and father, but usually it did not work that way.

Today, intrafamily tort immunity has been widely abolished, but a great deal of behavior that would be criminal or tortious between strangers may still be done with impunity within a family. In many states, the husband may legally force sexual intercourse upon his wife. In most states, spouse abuse is treated differently from other forms of personal violence—sometimes better, often worse. Children are offered limited state protection against their parents. Usually, crimes and torts will be recognized only if a child is badly abused; and even this occasional enforcement is often thought to constitute state intervention—justified, but intervention nonetheless. In theory, parents can be prosecuted for homicide, sexual abuse, serious physical assaults, and child neglect. In practice, however, a child's dependency is so extensive that many crimes, including assault and sexual abuse, often go unprosecuted.

3. *Changes in family hierarchy over time*— The nature and degree of power that the state allows one family member to exercise over another has changed over time and is regularly contested. Reforms that have claimed to provide for juridical equality between men and women have tended to modify the legal role expectations placed on husbands and wives. The role relationship between parent and child has also undergone considerable change over time. Because parents' power over their children is incomplete, the state must adjudicate borderline cases and in doing so necessarily influences the family. At one extreme, state prosecution of a father for intentionally killing his child is universally approved and is unlikely to be considered state intervention in the family; at the other extreme, charging a father with kidnapping for sending a child to her room as a form of punishment would strike most people as serious state intervention in the family. Courts must frequently draw a line between protecting the individual family member and promoting family authority, and different courts would draw the line closer to one or the other of these extremes. Exactly where a court draws the line, or where it would be expected to draw the line, will affect power relations within the family. The choices that courts make will be based on policy considerations and the state cannot avoid making decisions that will influence family relations.

Moreover, when parents disagree, the state has to decide which of the two to empower or to refuse to empower. This choice will in turn influence relations between the parents. Thus, what is frequently referred to as "nonintervention" involves an initial policy choice regarding family roles, followed by further policy choices regarding the details of those roles.

Because nonintervention is understood with reference to specific family roles and the state is expected to take these roles into account in settling disputes, courts must make one choice after another regarding the content and nature of these roles. As long as they do not ratify and enforce *all* assertions of authority by a husband or parent—for example, they prosecute intrafamily murder—courts must decide which behavior they will sanction and which they will not. These decisions require courts to take a stand on complex issues of intergenerational conflict and gender politics. The simple claim that the state should not intervene in the family tends to obscure the genuine problems of ethics and policy that continually arise.

C. *Nonintervention and the Egalitarian Family*

In theory it would be possible for the state to avoid taking a stand in favor of juridical hierarchy within the family. There are at least two ways the state could settle lawsuits involving families that would avoid ratifying family hierarchy. One would be to treat the family as a miniature state of nature by refusing to enforce any lawsuits between family members; the other would be to treat marriage as nothing more than an express contract and parentage as irrelevant, and enforce all lawsuits between family members just as though the litigants were not related. A consideration of these two contrasting extremes will further illustrate the difficulty with the concept of "nonintervention."

1. State of Nature Model— The state might seem to be able to remain neutral among family members by steadfastly refusing to enforce any tort, contract, or criminal law between members of a family. This approach, if carried to the extreme, would create a "state of nature" within the family, and could be said to take seriously the notion that families should work out their own problems. If a wife were being beaten, it would be up to her to deal with the problem; the state would not "intervene." If she dealt with the problem by shooting her husband, the state would be expected to continue its policy of "nonintervention." If a person were indicted for murder, it would be a sufficient defense to prove that the defendant and the victim were members of the same family. The killing would then be considered a family matter into which the state should not intrude.

As in any imagined state of nature, this approach would seem to benefit the stronger and prejudice the weaker members of a family. In fact, though, it might disempower the physically weak

less than the system that seems to operate in some communities—a system that treats intrafamily battery as private, but leaves homicide fully outlawed. Such a system is especially disempowering to wives if spouse abuse is not recognized as a justification for or defense to homicide.[55]

The State of Nature Model would not really enable the state to remain neutral or uninvolved in the family. Even if the state of nature were complete within the family, the state would still have to decide who constituted a family and how to deal with lawsuits involving third parties and members of the family. Also, a complete state of nature would not fit contemporary views of nonintervention in the family. A partial state of nature within the family might be acceptable to many people; but if the state of nature were partial, decisions about what laws to enforce among family members would require additional political choices that would affect authority and roles within families.

2. *Market Model*— A second way the state might seem to be neutral among family members is based on the opposite strategy of enforcement. The state could treat each member of a family as a juridical equal and treat their family status as irrelevant. Marriage and parentage would become private relationships, not recognized by the state. Courts would treat as irrelevant the fact that litigants were married to one another or that one was the parent of the other, and enforce lawsuits as between any unrelated people or strangers. This approach essentially ignores the family relationship and treats family members just as strangers are treated. Such a policy would not fit contemporary views of nonintervention in the family, especially as regards children. For example, under the Market Model, parents who disciplined their children by sending them to their rooms might be guilty of kidnapping and the children could have a valid cause of action for false imprisonment. Parents would have neither an obligation to support children nor a right to keep them from living away from home. Children and parents would be free to cut their own deals. Contracts entered into between children and their parents, or between any other family members, would be just as enforceable as contracts between any unrelated individuals.

The concept of nonintervention based on the Market Model is not only unacceptable to most people, but it is also no more coherent than laissez faire. All the arguments put forth by the legal realists to show the incoherence of laissez faire apply to nonintervention under the Market Model. The neutrality of the

55. *See* Olsen, *supra* note 1, at 1509.

Market Model would be formal neutrality only, even as between adults. The particular tort, contract, and criminal laws the state chose to create and enforce would affect the relative power of individuals and thus the bargains they could negotiate with their spouses, children, or other relatives. For example, strong battery laws are likely to help wives and children; weakened self-defense doctrines limit their ability to protect themselves, and would seem to help husbands.[56]

To illustrate further, consider the laws that forbid prostitution and nullify contracts when sexual services constitute all or part of the consideration on one side of the agreement. In our present society, the effect of nullifying such contracts usually enriches the male at the expense of the female.[57] The public policy against prostitution might have something to do with refusing to reduce women to sex objects, but it might have as much or more to do with preserving for men the economic resources that rein-

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56. Popular television programs have recently presented sympathetic portrayals of abused wives and children who, unable to enlist police protection against an abusive husband or father, killed their abuser. *See, e.g.*, "The Burning Bed" (dramatized account of abused wife killing husband); "60 Minutes" (news special on boy who shot his abusive father).

57. The case of Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), has been widely praised and blamed for the many things it held and refused to hold, but few if any commentators have paid attention to the court's insistence that a contract for sexual services is unenforceable. This seemingly neutral rule is likely in practice to hurt occasional unsophisticated women. Men, sophisticated or unsophisticated, are likely to be benefited or left untouched.

The anti-prostitution rule also limits the right to contract, and it limits it in a way more likely to hurt women than men. It is one thing to say that we will not assume that men necessarily get more out of sexual intercourse than women do, but it is quite another thing to say that courts may not consider and couples may not contract about any differential benefit that may accrue. Given the statistics on present satisfaction with sexual intercourse, I would suggest that this clearly harms women. *See* Leerhsen, Jackson & Bruno, *Ann Landers and 'The Act,'* NEWSWEEK, Jan. 28, 1985, at 76 [hereinafter cited as *Ann Landers*] (reporting survey results that 72% of women were dissatisfied with sex as practiced).

One criticism sometimes made of the *Marvin* case is that it invites courts to inquire into the intimate details of a couple's life. *See, e.g.*, Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REF. 805 (1985). To make "whisperings across the pillows," *id.* at 825, sacred, private, and unrepeatable is to support the sexual status quo. Sex as currently practiced seems to be startlingly more satisfactory to men than to women. *See Ann Landers, supra.* Privatizing sex reduces discussion that might lead to change. Sex is private in part because the state makes it private and because keeping sex private seems to serve the interests of those with power. The taboo on inquiring into the quality of male-female relationships may be based more on a fear of exposing systematic inequality than on anything else. Child custody cases often involve inquiry into the quality of parent-child relationships. Although commentators may criticize courts' ability to judge intimate relationships, child custody cases do suggest that courts can examine intimate relationships without any devastating effects.

force their prestige and power.[58] The result of policies that enrich men and impoverish women is that even if the law were to refuse to permit "family" defenses to contract, tort, or criminal actions, wives would still often bring to the marriage a position lower in the social and economic hierarchy, and thus a weaker bargaining position vis-à-vis their husbands.

III. THE EXPERIENCE OF STATE INTERVENTION

The assertion I have made—that the concepts of state intervention and nonintervention in the family are essentially meaningless—might ring hollow to an impoverished mother struggling to keep the state from taking her children away from her. More tragically, my assertion could sound absurd or seem totally meaningless to many innocent children who live in fear of the juvenile authorities. Hundreds of youngsters, the quality of whose lives has already been diminished by poverty and neglect, have been forced into silence and concealment. The specter of state intervention in the family denies to many of them even the partial relief they might get from sharing their pain and humiliation with a friendly neighbor or sympathetic teacher. Many such children exist, and to them state intervention can seem real and frightening.

There are many other examples of situations in which people experience themselves to be victims of state intervention. In the 1960's a husband and wife in Connecticut were denied legal access to contraceptives until they sued and appealed their case to the United States Supreme Court.[59] Earlier in the century, Lillie and O.B. Williams were prosecuted for bigamous cohabitation and sentenced to jail terms when state officials in North Carolina decided to challenge the Nevada divorces they had obtained from their previous spouses.[60] They too took their case to the United States Supreme Court and won, only to lose on a retrial and second appeal.[61] To both these couples state intervention would seem to be a very real concern.

State intervention may also have considerable meaning to the lover who, upon the death of his beloved, finds himself with no

58. For an elaboration of these ideas, see F. Olsen, Prostitution: The Stigma of Money (Apr. 16, 1985) (transcript of talk given at UCLA Law School) (copy on file with U. MICH. J.L. REF.).

59. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

60. *See* Williams v. North Carolina, 317 U.S. 287 (1942).

61. *See* Williams v. North Carolina, 325 U.S. 226 (1945).

status, their jointly shared property snatched away by the beloved's long-estranged parents. The lover has no say about funeral arrangements and cannot even attend services without the permission of the parents. Even if the couple drew up wills, the beloved's testament would once have been routinely set aside for presumed undue influence.[62]

The parents, however, might well consider their family intruded upon if the state were to limit their rights for the sake of their child's lover. Lillie and O.B. Williams's first spouses may have resented the courts of Nevada intervening in their family affairs by granting divorces against them when, under their own state law, they had committed no wrong and would expect to have a right to remain married.[63]

The experience of state intervention in the family can involve either affirmative coercive behavior by state officials, such as physically forcing a child away from his or her parent, or a refusal by state officials to come to the aid of one claiming a family right, such as the state's failure to order foster parents to relinquish a child to her natural parent.[64] From the child's perspective, the transfer of custody to natural parents the child barely knows would seem to be as serious intervention as it would be to take her away from a natural parent.

The experience of intervention depends upon having some expectation disappointed or some sense of entitlement violated. Disappointment and violation are very real experiences. Unfortunately, they cannot be avoided by a simple policy of nonintervention in the family. Moreover, disappointment and violation of hopes and dreams may be as distressing as the disappointment and violation of expectations and entitlements. It is not clear, in the example above, that the state should sacrifice the interests of a lover for the sake of the beloved's parents, just because the parents, under present law, have more settled expectations and entitlements.

Because the notion of state intervention depends upon a conception of proper family roles and these roles are open to dispute, almost any policy may be experienced by someone as state

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62. *See In re* Kaufman's Will, 20 A.D.2d 464, 247 N.Y.S.2d 664 (1964), *aff'd*, 15 N.Y.2d 825, 205 N.E.2d 864, 257 N.Y.S.2d 941 (1965). *See also* Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 239-48 (1981) (asserting that homosexuals' wills are subjected to heightened scrutiny for undue influence).

63. For a discussion of the difficulties with such conflicting rights, see Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984).

64. *See* Bennet v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976) (finding long period of separation from natural parent an extraordinary circumstance that can "trigger" the best interests of the child test).

intervention. In many situations, someone's expectations will be disappointed or sense of entitlement violated no matter what action the state takes or refuses to take. One can often argue that in a particular case nonintervention really means whatever one wants the state to do; any policy one dislikes might be labeled intervention.

For example, from one perspective, the state intervenes in the family when it provides contraceptives to minors. The "squeal rule" proposed by the Reagan administration, although not preventing the distribution of contraceptives, would have required that parents be notified that contraceptives had been given to their children.[65] This was supposed to reduce state intervention in the family and to enable parents to counsel their children about the problems of adolescent sex. Opponents feared it would deter the youngsters from obtaining contraceptives (but not from engaging in sex), and argued that this particular intervention in the family was justified.

From another perspective, the "squeal rule" does not reduce state intervention (whether for good or ill), but is itself a crude, abusive form of intervention. The state achieves a virtual monopoly on effective birth control by impoverishing young women and forbidding inexpensive over-the-counter sales of prescription contraceptives.[66] It then proposes to use this monopoly to intrude into the parent-child relationship and pass along information to the parents that the parents have neglected to obtain the old-fashioned way—by talking with their children. The state thus rewards neglectful parents and removes from them an incentive to maintain supportive communication with their children. It encourages parents to neglect their child's sex education and to ignore the pressures put upon their child until after the child has become sexually active and the state so notifies them.

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65. *See* 48 Fed. Reg. 3600 (1983) (to be codified at 42 C.F.R. §§ 59.2, 59.5). *See also* N.Y. Times, Feb. 20, 1983, at E5, col. 4. The rule was found unlawful on statutory grounds. *See* Planned Parenthood Fed'n of Am. v. Schweiker, 712 F.2d 650 (D.C. Cir. 1983). Some people have opposed the "squeal rule" on the grounds that certain fathers might demand sex from their daughters if they found out that the daughters were sexually active. Others fear fathers would respond with physical abuse of their daughters.

66. The state's role seems even more intensive and insidious when we consider how reluctant state officials are to prosecute date rape. The state permits unsafe streets that limit a woman's choices: she may stay home (statistically, a remarkably dangerous location for women), go out in a group of people, or go out with one man. Especially if she chooses the one-man option, the female may find herself faced with the further choice of consenting to sexual intercourse or being raped by him without recourse. Thus, women cannot really be said to have the option of refraining from sexual intercourse. Abstinence is not a reliable form of birth control for many women.

Nonintervention arguments can be leveled against laws and regulations that refuse to treat unmarried couples enough like a family[67] or against laws that treat them too much like a family.[68] Nonintervention arguments can be used to keep children from being put into foster care, to remove them from foster care, or to keep them from being removed from foster care.[69] Nonintervention arguments can even be leveled against a policy of enforcing contracts between unwed couples.[70] While one can sympathize with anyone who is disappointed by a state policy, it is hard to see that anything is actually gained by characterizing the cause of that disappointment as state intervention.[71]

IV. WHY IT MATTERS

The protective intervention argument, that the state should intervene in the family when necesary, has gained so much acceptance—just as the protective intervention argument against laissez faire has gained widespread acceptance—that one might wonder why we need the incoherence argument, that intervention and nonintervention are meaningless concepts. First, it is not the case that the exception has swallowed the rule. Under the protective intervention argument, the state is treated as having a policing function—to detect and correct those rare circumstances that disturb and disrupt the family, without questioning any of the basic individualistic foundations of society. The assertion that the state can and should avoid "intervention" in the family plays an important but generally unrecognized ideological role.[72] Further, focusing on "nonintervention" tends to mush and confuse the ethical and political choices we make. It directs our attention to a false issue and obscures genuine issues of ethics and policy. Finally, both laissez faire and nonintervention in

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67. *See* Chambers, *supra* note 57.

68. *See id.*; Burt, *Coercive Freedom: A Response to Professor Chambers*, 18 U. MICH. J.L. REF. 829 (1985).

69. *See* Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (acknowledging, but refusing to accept, argument).

70. *See* Burt, *supra* note 68.

71. This is not to deny the ideological significance of the concern, however. To complain that the hassling of your living arrangement (whether through zoning laws, fornication laws, or any other law or regulation) constitutes state intervention in the family is an ideological claim, a claim of entitlement to live the way you choose. For example, successfully characterizing state laws against homosexual relations as state "intervention" in the family tends to legitimate same-sex relationships.

72. For an interesting discussion of the ideological role of family law, see Freeman, *supra* note 12, at 387-401. *See also* Olsen, *supra* note 10.

the family have sprung up in modern versions—law-and-economics in place of laissez faire and the individual right to privacy in place of nonintervention in the family. These new forms, one labeled conservative, the other liberal, are flawed in the same way the originals—laissez faire and nonintervention—are flawed. The standard liberal criticism of law-and-economics and the standard conservative criticism of the right to privacy are both versions of the protective intervention argument. In each instance, I believe the incoherence argument presents a more important critique.[73]

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73. In the case of privacy, liberals argue that the fundamental principle of individual privacy offers a rational justification or grounding for a great many policies—ranging from access to contraceptives to a disapproval of surveillance over sexual choices. Conservatives often respond by pitting public morality against individual privacy. This is parallel to the protective intervention argument regarding the family. The conservatives assume that privacy is a coherent concept and that the rational elaboration of this principle would lead to the policies supported by the liberals. The argument of the conservatives that public morality justifies limiting privacy is like the argument that the state should intervene in the private family to protect against abuse.

The stronger and more important answer to the liberals' claim would be like the incoherence argument. Privacy is not a coherent concept and it does not lead to any indisputable policy choices. The state is implicated in privacy just as it is in family. Although I support many of the policies they advance in the name of "privacy," I believe the liberals are mistaken to think that they can ground or justify these policies on any rational or apolitical basis.

In the case of law-and-economics, conservatives argue that the concept of efficiency offers a rational justification for a great many policies. In particular, law-and-economics purports to demonstrate that many economic policies supported by liberals simply fail objectively—they will not produce the results the liberals hope to achieve. Liberals often respond by pitting equality, justice, or fairness against efficiency. This is parallel to the protective intervention argument against laissez faire policies toward the free market. Liberals often assume that efficiency is a coherent concept and that a relentless focus on efficiency would lead to the policies supported by the conservatives.

The stronger and more important answer to the conservatives' claim would be like the incoherence argument against laissez faire. "Efficiency" is indeterminate and does *not* lead to the policy choices that conservatives claim it does. Liberals do not have to resort to arguments that pit other goals against efficiency, but can challenge the basic underlying premises of conservative law-and-economics. *See* Kennedy, *Distributive and Paternalist Motives in Contract and Tort, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Kennedy, *Cost-Benefit Analysis of Entitlement Programs: A Critique*, 33 STAN. L. REV. 387 (1981); Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of Law and Economics*, 33 J. LEGAL EDUC. 274 (1983); Kelman, *Consumption Theory, Production Theory and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979); Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769. *See also* Horwitz, *supra* note 23; Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980).

CONCLUSION

State intervention in the family is an ideological, not an analytic concept. The incoherence argument demonstrates that neither intervention nor nonintervention has a coherent meaning. The protective intervention argument, that the state should intervene in the family whenever necessary to defend the interests of society or of individual oppressed family members, does not go far enough. First, it presupposes that nonintervention is a possible choice; and second, it usually accepts nonintervention as a norm or as an ideal.

The protective intervention argument misperceives the problems caused by unfortunate social policies. For example, the problem with state officials taking children away from poor parents is not really a problem of state "intervention," but a problem of the substance of that state behavior. What the state does is sometimes *so bad* that people would rather it did nothing—which of course is not possible. The effort to get the state to do nothing, even if it were possible, misfocuses attention. It is misguided to treat freedom as the polar opposite of state "intervention" or of government regulation. As Morris Cohen noted in another context, real freedom depends upon opportunities supplied by institutions that involve legal regulation.[74] The attempt to criticize state "intervention" instead of criticizing the particular policies pursued may be especially limiting for poor people, who often have to rely on various government programs and are thus less likely to benefit from any political strategy based on the myth of nonintervention.[75]

Sexual abuse of children provides an example of the inadequacy of the rhetoric of nonintervention. It also illustrates problems with the state giving adults so much authority and power over children.[76] A child's failure to report sexual abuse

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74. *See* Cohen, *supra* note 3, at 591.

75. *Cf.* MacKinnon, *The Male Ideology of Privacy: A Feminist Perspective*, 17 RADICAL AMERICA, July-Aug. 1983, at 23, 32 (noting that abortion rights are particularly easy to deny to poor women because the right is based on privacy).

76. The state establishes a situation of dependency and then allows as the only alternative a complete severing of the relationship. If you watch television ads for toilet paper and blue jeans, the puzzling question is not why incest is so widespread but rather that sexual abuse of children has any limits. If we make children totally dependent upon one or two adults and allow helplessness and dependency to be eroticized, we should not pretend surprise and outrage at child abuse. The state empowers adults and gives tax deductions for advertising that eroticizes domination. *See generally* J. Kilbourne, Killing Us Softly: Advertising's Image of Women (Cambridge Documentary Films, Inc. 1979) (film examining use of sex in advertising as reflective and partially constitutive of

may often be her best response to a bad situation. Incest deprives a child of autonomy and corrupts the protection the abusing parent offers the child. And when abuse is discovered, instead of empowering the child and making it possible for him or her to resist the adult, state officials tend to move in and take over—sometimes making matters worse. After revealing sexual abuse the child is all too likely to have even less autonomy and fewer options for dealing with his or her vulnerability and hurt. The child may be summarily denied the opportunity to maintain any relationship with the abusing adult, even if the child wants desperately to maintain a relationship. In cases of child abuse, including sexual abuse, state policy should end the abuse or empower the child to end it, not force the child to leave home.[77]

If we think in terms of intervention versus nonintervention, and consider our options to be thus limited, we are less likely to devise effective alternatives.[78] As we become less preoccupied with the myth of state intervention, perhaps we can focus proper attention on the realities of people's lives.

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culture).

77. How to empower children to end their abuse is a topic for another article. Most of us are not accustomed to thinking about ways to empower victims. For some early thoughts, see Olsen, *supra* note 63, at 407-09, 424, 431. It seems important to explore creative ways to improve the options available to children in difficult home situations. For example, modern technology might enable children to summon help quickly enough that it would be safe for them to stay with abusive parents to whom they are deeply attached.

78. While this essay has focused on the family, its thesis is general. The state cannot be neutral, nor can it be a neutral arbiter of rights. *See* Olsen, *supra* note 63; *Symposium: A Critique of Rights*, 62 TEX. L. REV. 1363 (1984).