define both domains, has begun to shift. Increasingly, "home" becomes indistinguishable from "work". Yet, at the same time, society strains to celebrate traditional understandings of childhood and of the parent-child relationship. The new dynamic, which defines the domestic sphere through metaphors that once applied to the marketplace and through metaphors that once distinguished the home, appears more fragile than the old dynamic, which relied on context to differentiate a view that prized status (at home) from a view that prized contract (at work). It is not clear whether the family will be preserved as a domain defined through love and loyalty. It is not clear whether the vision undergirding *Baker v . State* can long co-exist with that undergirdng *Troxel v. Granville*. But, it is clear that the law, reflecting the larger society, has been shaken by a monumental shift in understandings of relationships "at home", and that society and the law struggle to integrate a view of family "as enduring community" with a view of family as a collection of autonomous individuals, committed to choice and bargain.

and while the defendant was ill, assumed primary care for the child"[68].

Similarly, in *V.C. v. M.J.B.*[69], the Supreme Court of New-Jersey granted V.C. visitation rights with M.J.B.'s biological twin daughters. The New-Jersey court, like the Massachusetts court in *E.N.O.* reconstructed, but did not disavow, the centrality of traditional family life to children's welfare. "[R]egular visitation", the court concluded, "is in the twins' best interests because V.C. is their psychological parent"[70].

Both courts relied on the intentional choice of a biological mother to share parentage with her lover in concluding that application of the best interest standard was appropriate[71]. Then, however, in actually applying the best interest standard, each court affirmed its commitment to a traditional vision of family, as it invoked children and their interests as the essential determinant of its visitation decision. In short, each court modulated the contrast that its decision presented to traditional understandings of family by framing its decision merely to acknowledge familial relationships that were, at base, as traditional, at least in their essential tone and psychological relevance to the children involved, as any family relationship could be.

Conclusion

In the last decades of the twentieth century, American law widely reenvisioned the relationship between adults within families as fungible, transitory and open to negotiated bargain. The law has been more hesitant and more conflicted about other changes in the domestic arena. In general, it has resisted changes in the operation of families more strenuously than changes in the forms through which families are created and dismantled, especially in cases implicating children and the parent-child relationship. The law has evinced significant turmoil and faced significant dissension in defining and protecting homosexual and lesbian families. And finally, the law has frequently, though not always, presumed to reject changes that diminish the force of parental authority and that directly transform the scope of the parent-child relationship.

An ideological dynamic that has long defined the domestic sphere in American culture, one that traditionally opposed "home" to "work" but that depended on the contrast to

68 *Ibid*, at p. 892.

69 *V.C. v. M.J.B.*, 748 A.2d 539 (S.Ct. N.J. 2000), cert. denied, 2000 Lexis 6634, 69 U.S.L.W. 3257 (U.S. Oct. 10, 2000).

70 *Ibid*, at p. 555.

71 *Ibid* at pp. 553-554 (noting importance of "the volitional choice of a legal parent to cede a measure of parental authority to a third party"); *E.N.O. v. L.L.M.*, *supra* note 67, at p. 892 (noting plaintiff had raised the child "[w]ith the defendant's consent").

compel courts to focus on the forms through which families operate as well as on the forms through which they are created and terminated. In such cases, it is generally impossible to presume that adults' familial choices do not effect the character of the relationship between parents and children.

In such cases, courts cannot rely simply on contextualization to mediate between modernity and tradition. Instead, they depend on a series of alternative mechanisms. Among these is the postulate, deeply ingrained in contemporary American family law, that parents serve their children's best interests. By relying on that postulate, courts have validated nontraditional family structures while presuming to preserve a traditional vision of families and of the parent-child relationship. By invoking children and legal principles presumed to serve them (e.g., the "best interest" principle) courts identify themselves with traditional understandings of family. Yet, for almost two centuries the best interest principle has, in fact, provided for transforming visions of family life. Indeed, the principle, often criticized for its fundamental indeterminacy[65], has been essential to a system of family law anxious at once to preserve tradition and provide for change[66]. The principle continues to blur the discomforting contrasts modernity presents to tradition.

Several recent cases in which courts have granted visitation rights to nonparents are illustrative. Within the last few years, two courts, one in Massachusetts and one in New-Jersey, granted visitation rights to a woman who had acted as a parent to the children of her lesbian lover before the relationship between the women in question ended. In *E.N.O. v. L.L.M.*, the highest court in Massachusetts granted E.N.O. the right to visit with the young biological child of the woman with whom E.N.O. had lived for many years[67]. The court determined that "children of nontraditional families, like other children, form parent relationships with both parents, whether those parents are legal or de facto... Thus, the best interests calculus must include an examination of the child's relationship with both his legal and de facto parent". The court continued:"[a]fter the child's birth, the plaintiff resided with the child and the defendant as a family. With the defendant's consent, the plaintiff participated in raising the child, acting in all respects as a de facto parent. The GAL [guardian ad litem] found that the plaintiff was an active parent, responsive to the child's needs. The plaintiff also supported the family financially,

65 See R.H. Mnookin "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy" 39 *Law & Contemp. Prob.* (1975) 226.

66 I consider the survival of the best interest principle in greater detail in J.L. Dolgin "Why Has the Best-Interest Standard Survived?: The Historic and Social Context" 16 *Childn's Leg. Rts. J.* (1996) 11.

67 *E.N.O. v. L.L.M.*, 771 N.E.2d 886 (1999).

intermediate appellate court recognized "intentional parents," neither of whom had any biological connection to the child involved. *In re Marriage of Buzzanca*[59], involved a surrogacy agreement. Pamela Snell agreed to gestate and give birth to a baby for John and Luanne Buzzanca. The facts of the case differ from those of Johnson in that the contract provided for the embryo to be created from the gametes of anonymous donors. Thus, neither John nor Luanne had a biological connection to the child, a girl named Jaycee, born in April 1995. Moreover, the surrogate did not seek maternity[60]. Shortly before the child's birth, John filed for divorce. Several months later, Luanne, who had brought the child home from the hospital, sought child support from John[61].

The California Court of Appeal reversed a trial court decision that described Jaycee as without legal parentage. The appellate court determined that motherhood need not depend on "giving birth", "contributing an egg" or adopting a child[62]. Instead, the court explained that Luanne and John, having consented to the conception and birth of the baby, became that child's parents, just as a husband, under California law, becomes "the lawful father of a child born because of his consent to artificial insemination"[63]. Thus the holding in *Buzzanca* extends that of *Johnson* in that it predicates "natural" parentage on intentionality in the absence of any biological connection between the child and the intentional parents.

Moreover, the *Buzzanca* decision resembles *Johnson* in presuming that those identified as parents through reference to their intentions will serve their child's best interests[64]. Both courts clearly presumed that traditional families, characterized by enduring love and solidary commitment, can be created through the contractual choices of autonomous individuals as well as through the dictates of biological truth. Thus, in these cases, courts mediate with comparative ease the differences between a universe predicated on the notion of autonomous individuality and one predicated on the notion of holistic community. The courts in Johnson and in Buzzanca simply assume that families created through the presumptions of the marketplace can, once formed, resemble old-fashioned families of yore.

In custody cases courts cannot so easily mediate between modernity and tradition by distinguishing various aspects or dimensions of family from one another. These cases

59 *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. App. 1998).

60 Initially, Snell did file for custody. Later, she withdrew her claim. See D. Maharaj "Case May Redefine Fatherhood in State" *L.A. Times* Sept. 14, 1997 B1.

61 See *Jaycee B. v. Superior Court of Orange County*, 49 Cal. Rptr. 2d 694 (Ct. App. 1996).

62 *In re Marriage of Buzzanca, supra* note 59, at *1.

63 *Ibid*, at p. 282.

64 *Ibid*, at p. 293 (citing Johnson, *Johnson v. Calvert, supra* note 52, at p. 783).

parentage.

The California supreme court (affirming the holdings, but not the reasoning of two lower State courts)[54] concluded that Mark and Crispina Calvert were the baby's parents. The court grounded its decision on the Calverts' intentions to become parents of the baby Anna Johnson would gestate and to which she would give birth. The court explained:

> "We conclude that although [California law] recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child, that is, she who intended to bring about the birth of a child that she intended to raise as her own, is the natural mother under California law"[55].

Thus, the court relied on the parties' negotiated choices about parentage to identify a child's natural parents. Moreover, the *Johnson* court explained in some detail that intentional parents such as Mark and Crispina Calvert were, in the very nature of the case, as likely to be loving parents who would well serve their child's interests, as adequately as a mother or father whose parentage was predicated on a biological connection to a child. The court determined that the "gestator", by entering into the surrogacy agreement, had "in effect, conceded the best interests of the child are not with her"[56]. The court further explained that "[h]onoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike"[57].

In Johnson, the State supreme court limited the applicability of the notion of intentionality to parentage disputes involving a "tie" between two women, each of whom had a biological relation to one child[58], However, in a subsequent case, a California

to keep. I have used the term "surrogate mother" here to refer to Anna Johnson so as to suggest the character of the dispute as it came to the California courts.

54 The trial court, in a decision rendered orally from the bench, held for the Calverts on the ground that they were the genetic parents. *Johnson v. Calvert*, NO. X-633190 (Cal. App. Dep't Super. Ct. Oct. 22, 1990) (slip opinion). The intermediate appellate court also held for the Calverts. That court relied on a reading of state statutory law. *Anna J. v. Mark C.*, 268 Cal. Rptr. 369 (Ct. App. 1991).

55 *Johnson v. Calvert, supra* note 52, at p. 782 (footnote omitted) (emphasis added).

56 *Ibid*, at p. 782.

57 *Ibid*, at p. 783 (quoting M.M. Shultz "Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality" *Wis. L. Rev.* (1990) 297, 397).

58 *Ibid*, at p. 782.

B. Can Nostalgia for Tradition Be Safeguarded?: Mediating Modernity and Tradition

In contrast to the approach of the Supreme Court in *Troxel*, many State courts, in a wide variety of cases involving children, have sided expressly with modernity. Yet, at the same time, these courts have typically proclaimed a deep concern with safeguarding traditional understandings of children and of the parent-child relationship. They have employed a variety of mechanisms in mediating modernity and tradition. Some have assumed that the forms through which families are created need not implicate the forms through which they are actualized. That assumption seems to provide for the creation of traditional families through negotiated choices about parentage, not only between parents, but among parents and third-parties. Other courts have relied on flexible rules that presume simultaneously to recognize the autonomy of adult family members and the enduring dependency of children within families. In almost all of these cases, law-makers rely on elements of a traditional ideology of family (as hierarchical, holistic and solidary), but represent those elements as the traditional ideology in its entirety.

The first approach, which separates the forms through which families are created from the forms through which they operate has been applied to a number of recent cases occasioned by reproductive technology. In these cases, courts have presumed that families created through self-conscious parental intention and families created through biological connections can alike be modeled on nostalgic images of old-fashioned, enduring familial constellations. So, for instance, in two cases decided in the 1990s, California courts recognized intentional parentage as no different than "natural" parentage from a legal perspective, and presumably from sociological and moral perspectives as well.

The first of these cases, *Johnson v. Calvert*[52] involved a gestational surrogacy agreement in which Anna Johnson agreed to gestate an embryo created from the sperm and egg of Mark and Crispina Calvert and at the baby's birth, to forego any parental rights to which she might have been entitled in favor of the Calverts. In return, the Mark and Crispina Calvert agreed to pay Johnson $10,000 in a series of installments. In the sixth month of her pregnancy, Johnson wrote to the Calverts demanding that they pay all amounts due under the contract, and threatening that she would keep the baby if they did not. Thus, a month before the birth of baby Christopher, in September 1990, his gestational mother and his genetic parents[53] were in court, disputing his

52 *Johnson v. Calvert*, 851 P.2d 776, cert. denied, 510 U.S. 874 (1993).

53 Clearly, linguistic choices are essential in disputes about children created through reproductive technology. Generally, women such as Anna Johnson are referred to as "gestational surrogates". The term "gestational mother" is generally used to refer to women who gestate babies they intend, from the start,

more than it prizes individuality and equality. Justice O'Connor facilitated the reaffirmation of the original vision of family underlying *Meyer* and *Pierce* by focusing on a dispute between Tommie Granville and the trial court judge (a dispute between a parent and the State) rather than on the dispute between Granville and the parents of her daughters' dead father (a dispute among family members).

In effect, *Troxel*, as *Meyer* and *Pierce* before it, focuses on one central question: "Who owns the child?"[48]. As a result, the decision displaces many of the significant issues raised by nonvisitation statutes in general and by *Troxel* in particular. The plurality decision suggests that nonvisitation statutes might sometimes be constitutional, but fails to indicate how state legislatures and courts are to differentiate constitutional versions from others. Further, Justice O'Connor expressly refused to decide whether the Constitution "requires all non-parental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation"[49]. Thus, one of the most compelling issues raised by *Troxel*, whether nonparental visitation can ever be ordered against the wishes of a fit parent by a court anxious to serve a child's "best interests", is left unresolved[50].

Justice O'Connor's decision sides with tradition but describes contemporary demographics to suggest that, in fact, tradition has largely succumbed to modernity. Moreover, the decision relies on a model of family, patriarchal in design and committed to the notion of children as silent possessions[51], that society has widely, and in some part successfully, challenged. Thus, *Troxel* does not represent a reaffirmation of tradition so much as a wistful longing for a world in which parents were presumed to serve their children's interests and in which the strength of the parent-child relationship precluded the State from interfering with parental decisions, or at least with the decisions of parents presumed to be "fit" and middle-class. In the end, *Troxel* has limited force and uncertain applicability. More important, its ideological message rests precariously within a fragile jurisprudential frame.

48 See Woodhouse, *ibid.*

49 *Troxel* case, *supra* note 36, at p. 2064.

50 Since *Troxel*, State courts have found warrant in the Court's decision for a wide variety of responses. For instance, in *Hertz v. Hertz*, 717 N.Y.S. 2d 497 (2000), a New-York trial court, relying on *Troxel*, declared that state's visitation statute (which allowed only grandparents to petition for visitation rights) unconstitutional. However, in *Fitzpatrick v. Youngs*, 717 N.Y.S. 2d 503 (2000), a New-York court, also citing and discussing *Troxel*, rejected a mother's petition to dismiss the petition of her child's paternal grandfather. (Distinguishing statute at issue in case from that at issue in *Troxel*).

51 See Woodhouse, *supra* note 47, at p.1000 (referring to notion of children in *Meyer* and *Pierce* as voiceless, objectified, and isolated).

> "The liberty interest at issue in this case, the interest of parents in the care, custody, and control of their children, is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*... we held that the 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children' and 'to control the education of their own'. Two years later, in *Pierce v . Society of Sisters*... we again held that the 'liberty of parents and guardians' includes the right 'to direct the upbringing and education of children under their control'. We explained in *Pierce*... that '[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for addition obligations"[45].

Ironically, both *Meyer* and *Pierce* were re-interpreted in the middle decades of the twentieth century in a series of U.S. Supreme Court cases that acknowledged and furthered redefinitions of the family, or at least adults within families, as a collection of autonomous individuals, free to make sexual and reproductive choices without concern for traditional understandings of domestic relationships as holistic, hierarchical and preferably enduring[46]. Since the 1960s, citations to *Meyer* and *Pierce* have largely signaled judicial commitment to protecting individual rights within familial settings.

Justice O'Connor did not expressly reject that reading of the two cases, but as she presented *Meyer* and *Pierce*, another vision of family emerged, one closer to the vision of family assumed by Justice McReynolds when he wrote *Meyer* and *Pierce* in the 1920s[47] than to that reflected in the Court's reproductive decisions of the late twentieth century. This view prizes hierarchy and enduring community in familial settings far

45 *Troxel* case, *supra* note 37.

46 In *Roe v. Wade, supra* note 16, the Court referred to *Meyer* and *Pierce* in defining a "right of personal privacy" that protects a woman's decision to end a pregnancy. See also, *Griswold* case, *supra* note 11 (invalidating Connecticut birth control statute). Similarly, in *Carey v. Population Services*, 431 U.S. 678 (1977) (hereinafter: *Carey*), the Court referred to *Meyer* and *Pierce* as support for a constitutional "interest in independence in making certain kinds of important [reproductive] decisions". *Carey* case, *ibid*, at p. 678 (quoting *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), invalidating New-York statute that cirminalized sale and distribution of contraception to minors).

47 Barbara B. Woodhouse has impressively demonstrated that both *Meyer* and *Pierce*, later interpretations notwithstanding, represented a reactionary vision of childhood and of the parent-child relationships that treats children as objects, as the passive possessions of their parents. B.B. Woodhouse "'Who Owns the Child?': Meyer and Pierce and the Child as Property" 33 *Wm. & Mary L. Rev.* (1992) 995, 1091.

and Isabel Troxel about grandparental visitation. A family court judge had ordered more extensive visitation between the minor girls and their dead father's parents than the children's mother, Tommie Granville, was willing to grant. Granville challenged the constitutionality of Washington state's visitation statute that allowed "any person" to petition a state court for visitation with a child "at any time"[38] and that permitted a court to order visitation whenever it "may serve the best interests of the child"[39].

Three justices joined Justice O'Connor's plurality decision that invalidated the statute "as applied"[40] to Tommie Granville and her children. Six Justices wrote separate opinions in the case[41]. Justices Souter and Thomas[42], each writing separately, concurred with the plurality decision. Both, however, would have invalidated the statute not only as applied to Granville, but facially.

As a practical matter, the implications of the Court's decision are unclear and its applicability is narrow. As a jurisprudential matter, Justice O'Connor's decision suffers from ambiguity and confusion. The decision recognizes, and then proceeds to ignore, broad demographic changes that altered the shape of the American family in the second half of the twentieth century. Justice O'Connor expressly ascribed the widespread promulgation of nonparental visitation statutes such as that at issue in *Troxel* to the "changing realities of the American family"[43]. Yet, in assessing the constitutional validity of the Washington statute, the Court proceeded as if the family, or at least the parent-child relationship, had remained unaltered during the preceding half century. In particular, Justice O'Connor revivified a conservative message about family reflected in two decisions from the 1920s, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*[44]. Justice O'Connor wrote:

38 *Troxel* case, *ibid*, at p. 2057 (citing and quoting Sec. 16.10.160(3), Rev. Code Wash.).

39 *Troxel* case, *ibid.*

40 A court may hold a statute unconstitutional "as applied" to a particular situation or "on its face". The first option allows a State to enforce the statute in a different situation. The second option does not allow the statute to be enforced (unless a court is able to limit its application). M. C. Dorf "Facial Challenges to State and Federal Statutes" 46 *Stan. L. Rev.* (1994) 235, 236.

41 *Troxel* case, *supra* note 36, Justice Stevens at p. 2068 , Justice Scalia at p. 2074, and Justice Kennedy at p. 2075, dissented in separate opinions.

42 The reasoning of Justice Souter's concurrence resembled that of the plurality. *Ibid*, at p. 2065 (Souter, J., concurring). Justice Thomas concurred but on distinctly different grounds. *Ibid*, at p. 2067 (Thomas, J., concurring).

43 *Ibid*, at p. 2059.

44 *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating State statute that prohibited use of any language except English in elementary teaching) (hereinafter: *Meyer*); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidating Oregon statute that made public school education compulsory) (hereinafter: *Pierce*).

III. Change, Ambiguity, and Confusion

Since the early nineteenth century, American society has extolled childhood and has viewed children as precious, not only to their parents but to the society as a whole[34]. That view replaced an earlier vision of children as "objects of utility", to use Viviana Zelizer's phrase, rather than "objects of sentiment"[35] and of childhood as a short-term stage that distinguished "infants" (under about age seven) from all others.

Thus, even as the law has treated adults within families as tantamount to business partners, it has hesitated expressly to redefine children and childhood in similar terms. However, new understandings of adults within families inevitably effect the scope of the parent-child relationship and thus understandings of childhood. As courts and legislatures have welcomed modernity in an increasing number of contexts involving adult family members, the inevitable result has been confusion and contradiction with regard to children and the parent-child relationship.

The law has responded in a variety of ways to the contradiction inherent in the effort at once to redefine adults in families as autonomous individuals and to preserve old-fashioned understandings of children[36]. Some law-makers have expressly sided with tradition in regulating the parent-child relationship and in defining the scope of childhood. Others have sided with modernity, but at the same time, have generally presumed to safeguard traditional images of children. They have, for instance, attempted to mediate between the demands of modernity and the prerequisites of tradition by masking or displacing the contradictions that each presents to the other.

A. Can Tradition Be Safeguarded?

Troxel v. Granville[37], decided in 2000, appears to side firmly with tradition in safeguarding old-fashioned familial forms against alternative visions of family. In fact, the decision has limited applicability and lacks a coherent jurisprudential frame within which to understand and regulate family relationships.

Troxel arose out of a dispute between the mother and paternal grandparents of Natalie

34 This ideal vision has frequently been belied by social reality. In particular, the notion of childhood as sacred and of children as innocent and dear has frequently not been applied by mainstream society and its legal system to poor children and to minority children.

35 V.A. Zelizer *Pricing the Priceless Child: The Changing Social Value of Children* (Princeton, 1994) 7.

36 This essay focuses on judicial responses. Legislators have also pondered and, to some degree, reconstructed the parameters of the parent-child relationship. For instance, legislatures in all 50 States have promulgated statutes that provide for grandparent visitation to some degree. *Troxel v. Granville*, 120 S.Ct. 2054, 2064 n.1 (citing to grandparent visitation statutes in 50 states) (hereinafter: *Troxel* case).

37 *Troxel* case, *ibid.*

This choice allowed the court to avoid openly mandating the reconstruction of traditional understandings of marriage. That is, by framing the case as one about economic equality, the court was able to blur some of the essential implications of *Baker*. Moreover, the approach the court did adopt, one that focused on economic benefits rather than on the socio-cultural implications of same-gender marriages followed directly from, and thus resembled, early legal decisions to alter the boundaries of family law so as to define the domestic arena as one open to negotiation and choice. And like those earlier decisions, e.g., to validate pre-nuptial agreements, to enforce non-marital cohabitation contracts, to recognize divorce without accusations of fault, the decision in *Baker*, because grounded on a view of economic rights, seems more directly to concern the forms through which marriages are created and terminated than to concern the forms through which marriages are actualized and lived out. Thus, in some regard at least, the court's jurisprudential choice in *Baker*, though probably not self-consciously effected for this reason, serves to mitigate the far-reaching implications of the decision to re-define "marriage" as a relationship between two people of one gender. More clearly, the court's decision to require Vermont either to provide for same-gender marriage or to design an adequate alternative to marriage for same-gender couples, allowed the legislature to avoid expressly altering the essential scope and meaning of marriage.

At present, no state in the U.S. provides for marriage between same-gender couples. Moreover, the possibility of same-gender marriage suggested by *Baehr* and *Baker* has led to a widespread backlash. Over one-third of the states have promulgated statutes or constitutional provisions that explicitly preclude same-gender marriages[32]. In addition, Congress passed a law in 1996 that defines marriage as "a legal union between one man and one woman as husband and wife"[33].

Thus, even as the law appears ready to define family members as autonomous individuals in more and more contexts, and thereby utterly to transform traditional understandings of the domestic sphere, the law has been reluctant expressly to redefine the meaning of family even with regard to adults. This is even more evident in cases involving the parent-child relationship and the meaning of childhood.

32 Ferdinand, *supra* note 18, at p. A03; R.F. Kandel *Family Law: Essential Terms and Concepts* (2000) 16.

33 President Clinton signed the Defense of Marriage Act into law in 1996 (Pub. L. No. 104-199 (1996)). The constitutionality of the Act has not been tested since no state provides for marriage between people of one gender.

matter of constitutional law, the legislature must provide same-gender couples with the benefits incident to legal marriage in the state.

Indicatively, however, the court did not frame its decision with reference to the civil rights of gay and lesbian couples. Instead, the court focused on a fair distribution of the benefits of marriage (largely defined as economic)[30], and, as a theoretical, though not as a practical, matter, the court elided the civil rights of same-gender couples[31].

30 Plaintiffs described the state's existing marriage law as excluding them from a broad array of legal benefits and protections incident to the marital relation, including access to a spouse's medical, life, and disability insurance, hospital visitation and other medical decision-making privileges, spousal support, intestate succession, homestead protections, and many other statutory protections. *ibid*, at p. 870.

31 In particular, the court abandoned the State's traditional two-tier approach to the common benefits clause. *Ibid*, at p. 878. Under that approach, courts apply a rational basis standard in most common benefits cases, and a higher, strict scrutiny standard in common benefits cases involving either a suspect class or a fundamental right. *Ibid*, at pp. 893-894. See also *Brigham v. State*, 692 A.21d 384, 395 (Vt. 1997) ("The Common Benefits Clause in the Vermont Constitution is generally coextensive with the equiva lent guarantee in the United States Constitution, and imports similar methods of analysis") (citation omitted) (quoted in "Recent Case, Same Sex Marriage - Vermont Supreme Court Holds State Must Extend Same-Sex Couples the Same Benefits as Married Opposite-Sex Couples, Baker v. State" 113 *Harv. L. Rev.* (2000) 1882, 1884-1885) (hereinafter: "Recent case"). Instead, the court imposed a lower burden on the State than that suggested by the two-tier common benefits approach, and yet concluded that the State failed to meet even that lesser burden. See *Baker* case, *ibid*, at p. 894 (describing as ironic court's reliance on lower standard and conclusion that State could not meet even that standard).
This aspect of the decision has broad implications for constitutional jurisprudence in Vermont. Justice Dooley, who concurred in the court's decision, suggested that the court's abandoning a two-tier approach to the common benefits clause, augurs a revival of nineteenth and early twentieth century judicial decisions that invalidated "economic and social welfare" legislation "using an analysis similar to that employed by the majority in this case". *Baker* case, *ibid*, at p. 895 (Justice Dooley, concurring in part and dissenting in part). Certainly, the court's approach gives the judiciary wide scope to strike down legislation unrelated to same-gender marriage and civil rights more broadly. See *Recent* case, *ibid*, at p. 1887 (concluding that court in *Baker* case: "invited questions about the legitimacy of its holding by requiring a change with serious political implications without first carefully delineating the constitutionally required civil rights that may be involved") (note omitted).
As a jurisprudential matter, a decision to preserve a two-tier approach to common benefits issues would have been less disruptive than the decision the court, in fact, reached, to abandon that approach in favor of one that assumed a "relatively uniform standard" for interpreting all common benefits cases. *Baker* case, *ibid*, at p. 878. Under a two-tier approach, the same result could have been reached had the court defined gays and lesbians as members of a suspect class, entitled to strict scrutiny review. The court explains its choice as an effort to avoid "the artificiality of suspect-class labeling". *Baker* case, *ibid*, at p. 878 n.10.

of that state's constitution required the state to provide for the participation of same-gender couples in the "statutory benefits and protections afforded persons of the opposite sex who choose to marry"[25]. The decision directed the state legislature either to provide for marriage between same-gender parties or to create a "parallel 'domestic partnership' system or some equivalent statutory alternative"[26]. In April 2000, four months after the court's decision, Vermont law-makers rejected the legalization of same-gender marriage, and provided for "civil unions," intended to give same-gender couples[27] the economic and legal benefits of marriage[28].

Some commentators, including Justice Johnson (who dissented in part and concurred in part with the court's decision) would have preferred the Vermont court to have mandated that same-gender couples be entitled to marry[29]. The decision fell short of that end. But as a result of *Baker*, Vermont has become the only state in which, as a

25 *Baker* case, *supra* note 20, at p. 867. Vermont's common benefits clause, as written in 1777, guaranteed that the law be instituted for the common benefit, protection, and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family or set of men, who are a part only of that community; and that the community hath an indubitable, unalienable and indefeasible right, to reform, alter or abolish government, in such manner as shall be, by that community, judged most conducive to the public weal.
Vt. Constit. of 1777, ch. 1, art. VI (quoted in *Baker* case, *ibid*, at p. 874). The text was later altered to substitute the gender-neutral terms "person" and "persons" for "man" and "men" cited in *ibid*, at p. 874 n. 6.

26 *Baker* case, *ibid*, at p. 867.

27 Vt. Stat. Ann. tit. 15, Secs. 1201-1207 and Secs. 5160-5169 (2000).
The Vermont Secretary of State's office provides model language to be used by the justice of the peace or other authorized individual performing a civil union. The model language reads:
Justice of the Peace: We are here to join ____ and ____ in civil union (Then to each in turn, giving names as appropriate). Will you ____ have ____ to be united as one in your civil union?
Response: I will.
Justice of the Peace: (Then to each in turn, giving names as appropriate): Then repeat after me: 'I take you to be my spouse in our civil union, to have and to hold from this day on, for better, for worse, for richer, for poorer, to love and to cherish forever'.
(Then, if rings are used, each in turn says, as the ring is put on): 'With this ring I join with you in this our civil union'.
Justice of the Peace: By the power vested in me by the State of Vermont, I hereby join you in civil union.
Staff "Vermont Politicians Seeing Fallout from Gay-Union Law" *Houston Chronicle* 16/9/2000.

28 The Federal government does not recognize Vermont civil unions. Same-gender couples joined as "spouses" under Vermont law do not enjoy immigration rights, Social Security benefits or the right to file federal tax returns as married couples. See Ferdinand, *supra* note 18, at p. A03.

29 *Baker* case, *supra* note 20, at pp. 901-902.

or homosexuals or between more than two people. In the last few decades a number of state courts have been asked to find a constitutional right to same-gender marriage. Most have refused to do so[18]. However, in the last decade, the highest courts in two states have interpreted their respective state constitutions to guarantee either the right of same-gender couples to marry (Hawaii[19]) or to enter into a state-sanctioned relationship providing the essential benefits of marriage (Vermont[20]). In *Baehr v. Lewin*, the Hawaii Supreme Court relied on the equal protection clause of the state's constitution to invalidate a marriage law that restricted marriage to opposite-gender couples[21]. On remand, the lower court found that no compelling state interest supported the state's prohibiting same-gender marriage[22]. Two years later, the decision was rendered void when voters ratified an amendment to Article I of the Hawaii Constitution[23] giving the legislature "the power to reserve marriage to opposite sex couples"[24].

In 1999, the Supreme Court of Vermont, concluded that the "common benefits" clause

18 See, e.g., *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974) (rejecting constitutional arguments that state must permit marriage between same-gender couples); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (reaffirming definition of marriage as "union of man and woman" and rejecting constitutional arguments); *Storrs v. Holcomb*, 645 N.Y.S.2d 286 (N.Y. Sup. Ct. 1996) (rejecting constitutional arguments for same-gender marriage).
In addition, over three-fifths of the states now have statutes that ban same-gender marriages. P. Ferdinand "Vermont Legislature Clears Bill Allowing Civil Unions; Bay Couples Given Rights Like Those of Married People" *Wash. Post* (26/4/2000) A03 (listing the following 32 states as having such laws: Washington, California, Alaska, Idaho, Montana, Utah, Arizona, North Dakota, South Dakota, Kansas, Oklahoma, Hawaii, Minnesota, Iowa, Arkansas, Louisiana, Illinois, Mississippi, Michigan, Indiana, Kentucky, Tennessee, Alabama, Maine, Pennsylvania, West Virginia, Virginia, North Carolina, South Carolina, Georgia, Florida).

19 *Baehr v. Lewin*, 852 P.2d 44 (1993) (hereinafter: *Baehr*).

20 *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (hereinafter: *Baker*).

21 *Baehr* case, *supra* note 19. The state supreme court remanded the case for a finding as to whether same-gender marriage was precluded by a "compelling state interest". The Hawaii Circuit Court concluded that no such compelling state interest existed. *Baehr v. Miike*, 23 Fam. L. Rep. 2001 (Dec. 10, 1996).

22 *Baehr v. Miike*, Civ. No. 91-1394 (Haw. Cir. Ct. Dec. 3, 1996).

23 The constitutional amendment was initiated by the state legislature in response to *Baehr v. Miike, ibid.* See L.J. Harris & L.E. Teitelbaum *Family Law* (2nd ed., 2000) 298-299 (considering subsequent history of *Baehr* case, *supra* note 19).

24 The Hawaii Supreme Court then concluded that a 1997 statute restricting marriage to people of opposite genders was constitutional [www.state.hi.us/jud/20371.htm] (last visited on 10/4/02). See Harris & Teitelbaum, *ibid*, at pp. 299-300 (summarizing legal history of effort to provide for same-gender marriage in Hawaii).

Differences in the visions of family that informed *Griswold* and *Eisenstadt*, respectively, effected and represent a wide-scale transformation of American family law in the second half of the twentieth century. At the start of the period, the law aimed to preserve the family as a holistic social unit grounded in natural and supernatural truths. By the end of the twentieth century, family law viewed adults in family settings essentially as it viewed adults in the marketplace, as autonomous individuals responsible for designing and actualizing their own familial relationships. In short, in the several decades since the Supreme Court decided *Eisenstadt*, the law has increasingly recognized adults within families as comparable to business partners, free to define the scope and terms of their familial relationships.

Thus, by the end of the twentieth century, family law in the U.S. permitted adults, among other things, to end their marriages because they no longer chose to remain together, to fix the financial terms of divorce before entering into marriage, to re-create the rights and obligations of married couples within nonmarital contexts, and to make reproductive choices, free from the intrusion of the state[16]. Each change depended on the law's recognizing adults without families as autonomous individuals, connected to each other only insofar as they chose connection.

B. Adults in Families: Where Are The Limits?

Law-makers have widely recognized the right of adults within families to enter into contractual relationships that delimit the financial consequences of divorce and of nonmarital relationships. Even more, judges and legislators have increasingly recognized, and sometimes demanded respect for, gender equality within the domestic context. So, for instance, many states have either abandoned the common law doctrine of necessaries which obliged a husband to pay for his wife's debts or have expanded the doctrine to impose a similar obligation on wives[17].

While law-makers have been ready to cement such far-reaching changes in the implications of marriage, they have generally been more hesitant and more confused about changes that would directly challenge the notion of marriage as a relationship between one woman and one man. Thus, no state permits marriage between lesbians

16 See, e.g., *Griswold* case, *supra* note 11; *Eisenstadt* case, *ibid*; *Roe v. Wade*, 410 U.S. 113 (1973) (hereinafter: *Roe v. Wade*) (giving pregnant women limited right to abortion).

17 See, e.g., *Southwest Florida Reg. Med. Center v. Connor*, 668 So.2d 175 (Fla. 1995) (abandoning the doctrine); *Govan v. Med. Cred. Serv.*, 621 So.2d 928 (Miss. 1993) (abandoning the doctrine); *North Carolina Baptist Hosps. v. Harris*, 354 S.E.2d 471 (N.C. 1987) (expanding doctrine to oblige spouses to cover debts of other spouse for necessaries).

family, or at least adults within families, as independent partners, essentially indistinguishable from actors in the marketplace.

Griswold, though controversial for reviving a "substantive due process"[13] approach to constitutional rights, assumed a family with which any committed traditionalist would have been completely comfortable. Justice Douglas, writing for the Court, justified the decision through reference to the distinct scope and tone of the family.

> "We deal with a right of privacy older than the Bill of Rights, older than our political parties, older than our school system. Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths, a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions"[14].

In contrast, *Eisenstadt* displaced the traditional family assumed by the Court in *Griswold* in favor of its modern counterpart within which equality is presumptively preferred to hierarchy, choice to enduring commitment, and individual autonomy to holistic community. Justice Brennan explained:

> "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"[15].

13 Locating substantive protections in the Fifth and Fourteenth Amendment rights to "life, liberty, or property" has been termed "substantive due process". "Developments in the Law: The Constitution and the Family" 93 *Harv. L. Rev.* (1980) 1156, 1166. Substantive due process is associated with *Lochner v. N.Y.*, 198 U.S. 45 (1905) (hereinafter: *Lochner*). There, the Court, concerned with protecting economic rather than familial interests, invalidated a New-York law that prohibited bakers from working more than sixty hours in a week or ten hours in a day (*Lochner* case, *ibid* at p. 47). See J.L. Dolgin "The Family in Transition: From Griswold to Eisenstadt and Beyond" 82 *Georgetown L.J.* (1994) 1519 (analyzing and comparing *Lochner*, *Griswold*, and *Eisenstadt*).

14 *Griswold* case, *supra* note 11, at p. 486.

15 *Eisenstadt* case, *supra* note 12, at p. 453.

The shift has also occurred, though less certainly and less completely, with regard to the operation of familial relationships among adults, especially in contexts involving children.

A. The Transformation of Family Law

Within little more than a decade, family law changed dramatically in recognizing adults in families as autonomous individuals, largely free to define the terms of their domestic relationships. Beginning in the late 1960s, divorce became widely available to parties who chose to terminate their marriages. Previously, divorce depended on accusations of "fault" that defined the behavior of one spouse or both as so aberrant that the marriage was in effect considered nonexistent[7]. During the same years, courts began to validate and enforce antenuptial agreements written in contemplation of divorce[8]. Previously such agreements were considered violative of public policy and were dismissed. Further, in enforcing antenuptial agreements courts now routinely rely on standard principles of contract law[9]. Judicial recognition of non-marital cohabitation agreements, beginning in the 1970s, further indicates the law's readiness to view familial relationships between adults as matters of negotiation and choice[10].

Even more, comparison of two decisions of the U.S. Supreme Court, *Griswold v. Connecticut*[11], decided in 1965 and *Eisenstadt v. Baird*[12], decided in 1972, suggests the dimensions of the transformation in American visions of family in the second half of the twentieth century. *Griswold*, which invalidated a Connecticut birth control law, delimited a right to familial privacy. In *Griswold*, the Court presumed the social distinctiveness and moral centrality of the domestic sphere. Seven years later, in *Eisenstadt*, the Court invalidated a Massachusetts statute that prohibited the distribution of contraceptives to unmarried individuals. In *Eisenstadt*, the Court, expressly relying on its decision in *Griswold*, attached the right defined in *Griswold* to autonomous individuals who choose to relate to each other as "family" and, in effect, redefined the

7 L.M. Friedman *A History of American Law* (New York, 2nd. ed., 1985) 204-207.

8 See, e.g., *Posner v. Posner*, 233 So.2d 381 (Fla. 1970); *Osborne v. Osborne*, 428 N.E.2d 810 (Mass. 1981); *Scherer v. Scherer*, 292 S.E.2d 662 (Ga. 1982).

9 See D.J. Freed & T.B. Walker "Family Law in the Fifty States: An Overview" 22 *Fam. L.Q.* (1988) 417.

10 See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976); *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980).

11 *Griswold v. Connecticut*, 381 U.S. 479 (1965) (hereinafter: *Griswold*).

12 *Eisenstadt v. Baird*, 405 U.S. 483 (1972) (hereinafter: *Eisenstadt*).

Moreover, familial identities and relationships were understood as the product of biological inevitabilities and consequent statuses. In great contrast, identities and relationships at work were understood as the product of negotiation and choice. From the start of the Industrial Revolution until the last half of the twentieth century, choice, so central to life in the marketplace, was not prized within the domestic arena. Reflecting this understanding of kinship and home, family law sought to protect enduring, largely patriarchal relationships between husbands and wives. Thus, throughout the nineteenth and much of the twentieth-centuries, the law discouraged, prohibited or criminalized divorce, abortion, contraception, and extra-marital sexuality[4]. During the same period, society redefined children as innocent, precious "objects of sentiment"[5]. In the nineteenth century, compulsory school attendance laws replaced the institution of apprenticeship. Children, like women, were identified with home and hearth, and childhood, like motherhood, was widely romanticized, at least within middle-class contexts. The law, reflecting that new understanding of children, constructed the "best-interest" standard for resolving disputes about children's familial relationships[6]. This principle proclaimed the centrality of children to family life, and has thus served to affirm the continuing value of tradition. At the same time, the principle, which necessitates judicial subjectivity, has accommodated broad change in the law's understanding of children and the parent-child relationship.

II. The Transformation of the "Traditional" Family

For over a century, family law withstood the impulse of modernity to recognize the autonomous individual as the agent of action and to applaud choice within domestic contexts. Then, beginning in the 1960s, society and the law displaced traditional assumptions about family members and their relationships with the assumptions of modernity. The shift was rapid with regard to adults within families, especially with regard to the forms through which familial relationships could be created and terminated.

4 See M. Grossberg *Governing the Hearth: Law and the Family in Nineteenth-Century America* (North-Carolina 1985) 84-86 (discussing pressure during nineteenth century for more stringent marriage and divorce laws).

5 C.A. Degler *At Odds: Women and the Family in America from the Revolution to the Present* (1980) 66.

6 That rule replaced an earlier common law rule that preferred fathers in custody disputes without regard to the welfare of children. For instance, in *Rex v. DeManneville* (1804), 102 Eng. Rep. 1054 (K.B.), often noted to demonstrate the strength of that older rule, an English court granted custody of a nursing baby to her father despite the mother's uncontested claim that she sought to terminate her relationship with the father because of his extreme cruelty.

life to fit the needs of the capitalist marketplace, the family appeared to stand apart from the great, often apparently volcanic changes of the time.

In almost every regard, social understandings of the person within families and of relationships among family members contrasted with understandings of persons and relationships in other contexts. The home was defined as a universe of enduring loyalty and solidary commitment within which people were identified through reference to a series of fixed roles, reflecting familial statuses. Age and gender were of the essence in defining these statuses. Husbands were expected to provide for their wives and children, and women and children were expected to love and obey, or at the very least obey, their husbands and parents, respectively. These relationships were viewed as the fit consequences of inexorable natural and supernatural truths.

The anthropologist David M. Schneider described the American family in the 1960s, just before the changes that rocked the domestic arena in the last half of the twentieth century became manifest. Schneider wrote:

> "The set of features which distinguishes home and work is one expression of the general paradigm for how kinship relations should be conducted and to what end. These features form a closely interconnected cluster. The contrast between love and money in American culture summarizes this cluster of distinctive features"[1].

Thus, Schneider described the family as a social unit characterized by "enduring, diffuse solidarity"[2]. In each regard, the traditional family was expected to differ from the world of work. "Love", Schneider noted, was to home as "money" was to work:

> "The contrast between love and money in American culture summarizes the cluster of distinctive features [that distinguish home and work]. Money is material, it is power, it is impersonal and unqualified by considerations of sentiment or morality. Relations of work, centering on money, are of a temporary, transitory sort. They are contingent, depending entirely on the specific goal, money. Money gives a person power, that is, advantage over other people. . . Love is not material. It is highly personal and is beset with qualifications and considerations of sentiment and morality... The outcome of love is not a material product for sale, and the relations of love have an enduring quality which is contrary to the contingent quality of work. Indeed, its goal or value lies in its enduring qualities"[3].

1 D.M. Schneider *American Kinship: A Cultural Account* (1968) 48-49.

2 *Ibid*, at p. 51.

3 *Ibid*, at pp. 48-49.

The Transformation of American Family Law

Janet L. Dolgin*

Introduction

In the last half of the twentieth century, social understandings of the American family shifted dramatically. At mid-century, the domestic order was widely perceived in express contrast to the order of the marketplace. During the last decades of the twentieth century, the world of home, as lived and as imagined, began widely to coalesce with the world of work. Most important, the notion of the autonomous individual, long perceived as the agent of social action in the marketplace, began to provide a focus for delimiting the parameters of relationships within families as well as relationships at work.

During the same period, American family law, reflecting the social world it regulates, began to merge with the law of the marketplace. A system of legal rules that prevailed at mid-century and that presumed the family was, and was to remain, a hierarchical, holistic social community, was replaced with a set of rules that assumed family members to be autonomous individuals, largely free to choose the terms of their familial relationships much as they are presumed free to negotiate the terms of their relationships in the marketplace.

This shift from a "traditional" understanding of family to a "modern" understanding of family has been pervasively actualized with regard to adults within families. With regard to children, and to the parent-child relationship, however, society and law struggle to preserve tradition, but are simultaneously compelled by modernity. The result is widespread confusion, uncertainty and ambiguity.

I. The "Traditional" Family

The so-called traditional family was produced in the early years of the Industrial Revolution as a response to the values of the Enlightenment and to the far-reaching, and often discomforting, changes in the world of work that appeared in the last decades of the eighteenth century. As the "person" was re-defined in most domains of social

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