

# Self-Restraint: Social Norms, Individualism and the Family

*John Eekelaar\**

*Representations of contemporary individualism as “selfish” can lead to the perception that social and community relationships take place in a normative vacuum, which the law should attempt to fill. In this Article I argue that the representation is inaccurate and that replacing moral or social norms with legal norms carries serious risks. I suggest three models for the relationship between state law and family norms: the “authorization” model; the “delegation” model; and the “purposive abstention” model. Since I maintain that moral and social norms do pertain within families, I argue that the “purposive abstention” model should normally be preferred.*

## INTRODUCTION

This Article is concerned with the interrelationship between the social norms that affect family life and the state’s legal norms that apply in the same area. Its overall stance is that the state should be extremely cautious in using legislation to impose or refashion such norms. This conclusion is reached, firstly, by challenging some *claims* that family behavior has recently become seriously amoral as a result of an ethic of individualism. I argue that, although individualistic values have indeed gained stronger currency, this has largely been at the expense of the power of institutions or communities, and not at the expense of moral values. Turning to the types of relationship that might exist between state law and family norms, I suggest that three paradigms may be detected, which I have termed the “authorization” model, wherein the state expressly or tacitly gives the force of state law to norms and decisions

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\* Emeritus Fellow, Pembroke College, Oxford, U.K. I am grateful for comments by Rhona Shuz and other participants of the Cegla Center Conference on Rights and Obligations in the Contemporary Family, Tel Aviv University, December 15-17, 2010.

made within families; the “delegation” model, wherein the state prescribes and gives legal force to the norms to be followed within families, which can therefore be seen as delegates through which state law and policy is applied; and the “purposive abstention” model, wherein moral or social obligations within families are not normally given the force of law, unless their failure threatens community interests, or for the purpose of achieving justice when families fall apart. However, the general law of the state, including human rights norms, remains always applicable, and states are free to influence family behavior in other ways. I explore these models in some detail, and conclude that the “purposive abstention” model should normally be preferred.

## I. INDIVIDUALISM AND OBLIGATIONS

It has been a persistent theme of social commentators since at least the 1980s that we live in a society characterized by little individual self-restraint. The theme is mirrored in the title of Avner Offer’s *The Challenge of Affluence: Self Control and Well-Being in the United States and Britain since 1950*.<sup>1</sup> This lack of restraint has often been said to have corrupted family life. My theme, however, is that, whatever truth there may be in this as a representation of behavior in general, such as the consumerism fuelled by corporate advertising and other forms of corporate behavior, this presents an oversimplified picture of family behavior. Indeed, I suggest that we should be more concerned that *states* should exercise self-restraint when considering whether to resort to using the law to buttress norms of family behavior.

It is a commonplace that social behavior takes place in a network of social (in which I include “moral”) rules. These range from accepted modes of courtesy and socially approved dress codes, to notions of “doing the decent thing” and conformity with group practices, whether it’s sporting team affiliation or cultural or religious identification. Most of these rules are not expressed in state legislation, though some legislation may reflect their values, and the application of law might assume their presence.<sup>2</sup>

Such rules operate within both the public and private domains, including the family. They are constraints on behavior. They have, however, been insufficiently regarded by those many commentators who have, from at least the 1980s, attributed the perceived ills of modern societies to some form of

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1 AVNER OFFER, *THE CHALLENGE OF AFFLUENCE: SELF CONTROL AND WELL-BEING IN THE UNITED STATES AND BRITAIN SINCE 1950* (2006).

2 John Eekelaar, *Uncovering Social Obligations: Family Law and the Responsible Citizen*, in *MAKING LAW FOR FAMILIES* 9 (Mavis Maclean ed., 2000).

“individualism.” Such critiques have been heavily influenced by the discourse of psychotherapy which by its nature focuses on the psychological states of individuals rather than the social worlds they inhabit. Small wonder, then, that the individuals come across as self-regarding.

The idea of “individualism” identified by Robert Bellah and colleagues in 1985 as “the first language in which Americans tend to think about their lives,”<sup>3</sup> which leads to a state of affairs where “no binding obligations and no wider social understanding justify a relationship,”<sup>4</sup> was significantly influenced by statements from religious ministers, therapists, psychologists and psychiatrists. Anthony Giddens’s concept of “confluent love,” which lasts only as long as a relationship fulfills each party’s needs, was developed from Freudian psychoanalysis, therapeutic works and self-help manuals.<sup>5</sup> He did, however, recognize that the sources may not “offer accurate accounts of the changes affecting personal life.”<sup>6</sup> At the same time, Peter Singer described the dominant twin assumptions of American society as being “looking out for number one” and “getting more money.”<sup>7</sup> He drew largely on Bellah’s work, the claims of socio-biology, and examples of conspicuous crimes and financial greed in the America of the 1980s. Such characterizations certainly capture a cultural ethos. But they are flimsy evidence upon which to assume a massive breakdown of the way families function.

Ulrich Beck and Elisabeth Beck-Gernsheim have presented a more balanced view. In *Individualization* they state roundly:

[T]he stereotype in people’s heads is that individualization breeds a me-first society, but, as we will try to show, this is a false, one-sided picture of what actually happens in the family, gender relationships, love and sex, youth and old age. There are also signs that point towards an ethic of “altruistic individualism.”<sup>8</sup>

Nevertheless, the “one-sided” picture has persisted. Robert Kraynak, writing from a conservative Christian point of view in the same year as Beck

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3 ROBERT E. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE*, at viii (1985, updated 1996).

4 *Id.* at 107.

5 ANTHONY GIDDENS, *THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE AND EROTICISM IN MODERN SOCIETIES* (1992).

6 *Id.* at 64.

7 PETER SINGER, *HOW ARE WE TO LIVE? ETHICS IN AN AGE OF SELF-INTEREST* 99 (1992).

8 ULRICH BECK & ELISABETH BECK-GERNSHEIM, *INDIVIDUALIZATION: INSTITUTIONAL INDIVIDUALISM AND ITS SOCIAL AND POLITICAL CONSEQUENCES*, at xxii (2001).

and Beck-Gernsheim, refers to a society marked by “corrosive selfishness.”<sup>9</sup> Zygmunt Bauman, in the forward to Beck and Beck-Gernsheim’s book, wrote that “the individual tends to be lukewarm, sceptical, or wary of ‘common good,’ ‘good society’ or ‘just society.’”<sup>10</sup> People, he suggests, wonder “what is the sense of ‘common interests’ except allowing each individual to satisfy his or her own?”<sup>11</sup> In a similar vein, Oliver James, also drawing on sources from psychology and the experiences of certain individuals, has argued that the pursuit of “selfish” market capitalism has seriously compromised people’s mental health.<sup>12</sup> Another psychotherapist, Sue Gerhardt, has attributed the prevalence of modern-day selfishness to lack of parental involvement in early infancy.<sup>13</sup> Since female employment has continued to rise, this diagnosis, if true, bodes ill for the next generation.

As their sometimes lurid subtitles suggest, these accounts seek to characterize the whole fabric of modern societies, or at least capitalist societies, as being overwhelmed by self-regarding behavior. But comparisons are seldom made with other societies, either contemporary or historical. Is self-regarding behavior not to be found among those with power in less democratic societies? What about societies, earlier or contemporary, dominated by aristocracies or a patriarchy, or engaged in nationalism or imperialism? What about the unregulated capitalism of the nineteenth and early twentieth centuries? Other forms of selfishness could be detected in past structures of family law within which men exercised power over women, and parents over children. The natural tendency of groups to seek to replicate themselves could be seen in the selfish desire of parents to control the type of person they want their children to be. An encapsulation of what I mean may be found in Benjamin Britten’s opera of the Henry James story, *Owen Wingrave*, in which Owen’s pacifism is tragically overwhelmed by his family’s military tradition, symbolically represented by portraits of his ancestors gazing disapprovingly at him for his failure to follow their example. This was first shown on television, perhaps significantly in 1971, near the beginning of the period of great reforms in family law, which can be seen as the gradual assertion by individuals of

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9 ROBERT P. KRAYNAK, *CHRISTIAN FAITH AND MODERN DEMOCRACY: GOD AND POLITICS IN THE FALLEN WORLD* 167 (2001).

10 Zygmunt Bauman, *Foreword to BECK & BECK-GERNSHEIM, supra note 8*, at xiv.

11 *Id.* at xvii.

12 OLIVER JAMES, *AFFLUENZA: HOW TO BE SUCCESSFUL AND STAY SANE* (2006); OLIVER JAMES, *THE SELFISH CAPITALIST: ORIGINS OF AFFLUENZA* (2008).

13 SUE GERHARDT, *THE SELFISH SOCIETY: HOW WE ALL FORGOT TO LOVE ONE ANOTHER AND MADE MONEY INSTEAD* (2010).

emancipation from the power of institutions, whether in the form of groups or status roles, to control their lives.

Christie Davies characterized the last third of the twentieth century as witnessing, in Britain, a shift from the world of moralism, one based on the principle that the main purpose of policy is to reward the virtuous, protect the innocent, and penalize the wicked, to a world of causalism in which the purpose of policy is to minimize harm in aggregate regardless of desert.<sup>14</sup> This is illustrated by the arguments deployed with respect to the abolition of capital punishment, the liberalization of abortion law, the reform of divorce and decriminalization of homosexuality. Davies identifies the philosophical position driving this shift as being the assumption that actions are caused by circumstances rather than autonomous choices, which he traces to the late nineteenth century. In fact, its origins lie much earlier, at least in the eighteenth century Enlightenment. But this did not imply unrestrained individualism or a rejection of morality.<sup>15</sup>

Similarly, while changes in family law from the late 1960s show a strong move away from institutional moralism,<sup>16</sup> they can be seen as embracing a new type of morality, rather than an abandonment of it. Hence the growth of human rights and other forms of regulation in the late twentieth century, the very period during which selfish individualism is said to have begun to flourish, means that many activities are now dominated by new duties to have regard to others. These include duties to avoid discrimination on grounds of gender, race, religion, disability and sometimes sexual orientation, to safeguard other people's health and safety, and to be aware of people's other human rights. Some say the scope of responsibilities has increased too much. But they now bind those very institutions which previously exercised such extensive discretionary power over others and frequently ignored their interests.

Democratic societies have imposed these responsibilities upon themselves. It is not clear how this could have happened if those societies were constituted overwhelmingly of self-seeking "individualists." In *Happiness: Lessons from a New Science*,<sup>17</sup> in which he twice referred to "individualism" in the sense of individual pursuit of happiness as being "rampant," as if it were a virus, and once as "unrestrained," as if all social bonds had dissolved, Richard Layard,

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14 CHRISTIE DAVIES, *THE STRANGE DEATH OF MORAL BRITAIN* (2004).

15 See JONATHAN ISRAEL, *A REVOLUTION OF THE MIND: RADICAL ENLIGHTENMENT AND THE INTELLECTUAL ORIGINS OF MODERN DEMOCRACY* 192-93 (2010) (referring to Diderot and d'Holbach); ISAIAH BERLIN, *POLITICAL IDEAS IN THE ROMANTIC AGE: THEIR RISE AND INFLUENCE ON MODERN THOUGHT* 38-69 (referring to Helvetius).

16 John Eekelaar, *The End of an Era?*, 28 J. FAM. HIST. 108 (2003).

17 RICHARD LAYARD, *HAPPINESS: LESSONS FROM A NEW SCIENCE* (2005).

like Peter Singer, traced the origins of this apparent modern individualism to Adam Smith. But Amartya Sen has challenged this view of Smith, pointing out that, although Smith indeed saw *exchange transactions* as being grounded in mutual self-interest, he was well aware that people have other motivations and act according to social norms of behavior. Sen observes:

[W]hile Smith was perfectly clear on the importance of a variety of motivations that, directly or indirectly, move human beings, a very large part of modern economics has increasingly fallen for the simplicity of ignoring all motivations other than the pursuit of self interest, and brand-named “rational choice theory” has even elevated this falsely alleged uniformity in human behaviour into a basic principle of rationality.<sup>18</sup>

So we should be cautious about accepting the extreme view that we live in amoral societies. It is certainly true that *institutional* dominance (whether in the form of actual institutions, like churches, or social institutions, like marriage) has receded. However, although in most Western countries legal regulation over how married couples should conduct their marital relationship has been largely withdrawn, when asked in 1998 whether adultery was wrong, eighty-two percent of respondents to the British Social Attitudes Survey said it was always, or almost always, wrong.<sup>19</sup> In the early 1990s Janet Finch and Jennifer Mason found that despite the absence of a general normative assumption that members of the wider family have a duty to support other members, a majority (fifty-eight percent) of their respondents held that children do have an obligation to “look after their parents when old.” What seemed to predominate was that a sense of responsibility could arise, with regard to *any* family member, through a process of “commitment” over time (through interaction and reciprocal assistance), and that by their nature such commitments are likely to be more common between parents and children than other family members.<sup>20</sup> More recently, Gillian Douglas and colleagues have shown that family bonds remain strong when people exercise their testamentary powers.<sup>21</sup>

These moral, or social, rules can be varied, complex, and nuanced. That is why it is so difficult to cast them in legal form. A recent cross-national

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18 AMARTYA SEN, *THE IDEA OF JUSTICE* 187 (2009).

19 *Religious Observance*, SOL SURVEYS ONLINE, [http://www.ark.ac.uk/sol/surveys/gen\\_social\\_att/bsa\\_ro/1998/website/Religious\\_Observance/ADULTERY.html](http://www.ark.ac.uk/sol/surveys/gen_social_att/bsa_ro/1998/website/Religious_Observance/ADULTERY.html) (last visited Jan. 4, 2011).

20 JANET FINCH & JENNIFER MASON, *NEGOTIATING FAMILY RESPONSIBILITIES* (1993).

21 Gillian Douglas, Hilary Woodward & Alun Humphrey, *Enduring Love? Attitudes to Family and Inheritance Law in England and Wales*, 38 *J.L. & Soc’y* 245 (2011).

European study showed that, while slightly under half of U.K. respondents accepted the concept of filial duty to elderly parents, affectional ties were very strong, and nearly two-thirds of people over seventy-five were receiving “instrumental” support from their children.<sup>22</sup> High affectional ties have also been found in the United States, where it has been suggested that multigenerational relationships are becoming increasingly important as marriages have become more unstable.<sup>23</sup> It also seems to be the case that some families are more “tight-knit” than others, so that people who support their elderly parents (and parents-in-law) are more likely to support their adult children, and vice versa.<sup>24</sup>

The subtlety of the contemporary sense of family obligations was shown also in the responses to research by Mavis Maclean and John Eekelaar into the reasons why people provide support for other family members.<sup>25</sup> It was found that some perceived the obligations as being externally imposed, in particular by the institution of marriage; others (including both the married and unmarried) saw their sense of obligation as a normative force that evolved according to the nature and progress of the relationship; still others (including the married and unmarried) referred to independent ethical values, in particular the “golden rule” (doing unto others what you would have them do unto you), sometimes in the form of having a duty to repay benefits received; some saw the obligations as lying in a duty to build up mutual trust and confidence. Similar sources of obligation were drawn upon to ground duties to a partner’s family (for example, to their parents).

Offer’s dismissive view of non-resident fathers as being generally unwilling to support their children unless they are sleeping with the mother<sup>26</sup> is not supported by the evidence. It is true that child support payments are frequently insufficient for the receiving family’s needs, and some fathers appear to have resources to pay more than they do. But two-thirds of divorced fathers appear to provide some form of support, as do one-third of fathers who had formerly cohabited unmarried with the mother or who had never

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22 Ariela Lowenstein & Svein Olaf Daatland, *Filial Norms and Family Support in a Comparative Cross-National Context: Evidence from the OASIS Study*, 26 *AGEING & SOC’Y* 203 (2006) (results for other countries were similar).

23 Vern L. Bengston, *Beyond the Nuclear Family: The Increasing Importance of Multigenerational Bond*, 63 *J. MARRIAGE & FAM.* 1 (2001).

24 Emily Grundy & John C. Henretta, *Between Elderly Parents and Adult Children: A New Look at the Intergenerational Care Provided by the “Sandwich” Generation*, 26 *AGEING & SOC’Y* 707 (2006).

25 Mavis Maclean & John Eekelaar, *Marriage and the Moral Basis of Personal Relationships*, 31 *J.L.S.* 510 (2004).

26 OFFER, *supra* note 1, at 338.

cohabited with her.<sup>27</sup> The significant factor making support more likely is the time the father lived with the child, showing that the relationship that had been built up usually survived even repartnering by the father or mother.<sup>28</sup>

Research led by Jacqueline Scott at Cambridge reportedly has found that people's happiness is strongly associated with their perception of the happiness of those who are closely associated with them.<sup>29</sup> This is strong evidence that people are by no means entirely self-centered, and that such concerns for others can readily support feelings of obligation to others. It is enough for my present purposes to draw attention to the evidence that, whatever the shortcomings of present consumer-oriented societies and the growth of "individualism," people in them have not completely abandoned moral or social rules in regard to their families. I now turn to consider in general terms the nature of social obligations and their relationship to legal obligations within families.

## II. SOCIAL OBLIGATIONS AND LEGAL OBLIGATIONS

Perhaps unsurprisingly, the worrying image of a society of self-interested individuals, unrestrained by social bonds, has prompted demands for constructing, or reconstructing, communities based on legal obligations. This has included interpersonal relationships on which groups confer significance through their social status. For example, Milton Regan, while ascribing central significance to supporting actual interpersonal relationships, wished to enhance socially or legally ascribed status roles, reinforced by punitive measures.<sup>30</sup> Scott Fitzgibbon fears the arrival of a legal and social order "without duty, fault or shame."<sup>31</sup> Katherine Spaht calls for greater attention to "moral" behavior in divorce resolution.<sup>32</sup> These writers celebrate features

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27 MAVIS MACLEAN & JOHN EEKELAAR, *THE PARENTAL OBLIGATION: A STUDY OF PARENTHOOD ACROSS HOUSEHOLDS* 127, 139 (1997).

28 Cynthia Grant Bowman, *The Legal Relationship Between Cohabitants and Their Partners' Children*, 13 *THEORETICAL INQUIRIES L.* 127 (2012).

29 *Happiness is Other People*, CAMBRIDGE NEWS (Apr. 15, 2010, 8:55 AM), <http://www.cambridge-news.co.uk/Home/Happiness-is-other-people-study-shows.htm>.

30 MILTON REGAN, *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993).

31 Scott Fitzgibbon, *A City Without Duty, Fault or Shame*, in *RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* 28 (Robin Fretwell Wilson ed., 2006).

32 Katherine S. Spaht, *Postmodern Marriage As Seen Through the Lens of ALI's "Compensatory Payments,"* in *RECONCEIVING THE FAMILY: CRITIQUE ON THE*



of communal living, especially family living, which most people consider virtuous. However, they apparently assume that these virtues can be translated seamlessly into legal obligations and implemented through legal processes. Hence Amitai Etzioni on the one hand allows that individuals might be legally free to disregard the “moral voice” of the community, but on the other describes law “in a good society (as being) first and foremost the continuation of morality by other means.”<sup>33</sup>

This is not to belittle the benefits of strong personal and communal relationships. However, these relationships have value primarily when they are forged through the virtues of love, loyalty and sacrifice, not when they are compelled through coercion. In his classic exchange with Patrick Devlin, H.L.A. Hart argued that the move from social or moral obligation to legal obligation requires additional justification beyond mere consistency with community values.<sup>34</sup> For Hart, this was because of the pain inflicted by criminal law. But there are other reasons. One is that the enforcement of law is inevitably a bureaucratic process, with little sensitivity to the nuances of the contexts of many personal relationships. Another is that communities, including families, have a history and power structure, so that to reinforce personal and community relationships with social coercion, and especially law, carries the risk of reinforcing sectional interests and even oppression. On the other hand, law is the only safeguard individuals have *against* the exercise of power.

Against this background, I now propose three paradigmatic models for the relationship between norms of family behavior created by the state and social norms of family behavior.

### III. FAMILY NORMS AND LEGAL OBLIGATIONS: THREE MODELS

We can consider families as groups within which a variety of social norms operate. The question therefore arises whether the state should enforce these norms as part of its institutional law; or whether the state should impose its own laws to supplement or even replace (all or some of) the group norms; or whether the state should leave well alone, intervening only in rare cases.

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AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 31, at 249.

33 AMITAI ETZIONI, THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY 139, 143 (1997).

34 H.L.A. HART, LAW, LIBERTY AND MORALITY (1963).

The history of state regulation of the family is of course complex.<sup>35</sup> Here, I offer a tripartite typology of possible modes of the relationship, though the lines between them are not always sharp.

One model is where states allow *families* to define the obligations their members owe to one another, and recognize their authority as having the force of law. I call this the “authorization” model because the state authorizes the family to set norms and determine outcomes which the state will enforce as law. This model has rarely been used in common law jurisdictions. Another model is where the *state* prescribes what those norms should be, and expects families to follow them as delegates of the state’s authority. I call this the “delegation” model. Enforcement is either through private actions by family members or public actions by recognized officials. While usual in civil law jurisdictions, this approach has been less prominent in common law jurisdictions except where families break down, or fail to function properly in conditions of social or economic stress. The third model is where the state refrains from legally prescribing the content of norms within families, although it may seek to influence them in other ways, while the general law remains operative in the background. I call this the “purposive abstention” model.

#### **A. The Authorization Model**

Whatever may have been the case in pre-Christian times, the Church and, later, the centralized monarchy ensured that families in England have had no authority to create their own rules with force of law about central aspects of their normative behavior, such as marriage, annulment, matrimonial property, inheritance and adoption.<sup>36</sup> Even parliamentary divorce, under which special legislation was enacted to apply to specific families at the behest of the husband (rarely the wife) when the spouses divorced, was subject to a cumbersome procedure and supervision by Members of Parliament.<sup>37</sup>

The closest illustration of the model appears to be New Zealand’s attempt to accommodate Maori culture in the Children, Young Persons and Their Families Act 1989.<sup>38</sup> Under the Act “[i]nstead of the state, including the courts, taking a dominant role in protecting children and making decisions

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35 R.W.J. Dingwall & J.M. Eekelaar, *Families and the State: An Historical Perspective on the Public Regulation of Private Conduct*, 10 *LAW & POL’Y* 341 (1988).

36 JACK GOODY, *THE DEVELOPMENT OF THE FAMILY AND MARRIAGE IN EUROPE* (1983).

37 COLIN S. GIBSON, *DISSOLVING WEDLOCK* (1994).

38 Children, Young Persons and Their Families Act 1989 (N.Z.).

affecting them, the initial and substantial role is given to the family itself . . . ”<sup>39</sup> “Family group conferences” were established in cases involving children, with power to devise plans which could direct with whom a child was to live, what payments were to be made to support the child and, in youth justice cases, what forms of reparation a child should make. The group therefore fashions obligations which operate between members of the extended family (*whanau*). However, coordinators of the conferences (who are state officials) have extensive powers to decide who can attend the conferences, in effect giving those officials power to define the term “*whanau*.”<sup>40</sup>

Since concerns were expressed that conflicts of interest between family members increased the vulnerability of children and young people, the state therefore signaled a strong supervisory interest by passing an early amendment to the act stipulating that, in respect of care and protection issues, the welfare and interests of the child were to be a first and paramount consideration.<sup>41</sup> The state also drew back from lending its enforcement powers to the agreed outcomes. Where outcomes cannot be agreed, cases may be referred to courts.

Despite these safeguards, it has been suggested that conferment of these powers on families has posed the risk of undermining the quality of related state services by promoting a perception that problems within families are of concern to family members, and of little concern to the state, and doubts have been expressed whether the system has brought about obvious improvements to child protection in New Zealand.<sup>42</sup>

## B. The Delegation Model

Historically, in England, the most significant aspect of family life which fell under the precepts of state law concerned the parties’ sexual relationship (there was a duty to consummate) and in particular the wife’s duty to submit, sexually, to the husband, and to him alone. So he was immune from charges of rape, and her adultery was considered more delinquent than his. But both

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39 W.R. Atkin, *The Courts and Child Protection — Aspects of the Children, Young Persons and Their Families Act 1989*, 20 VICT. U. WELLINGTON L. REV. 319 (1990).

40 Joan Metge & Donna Durie-Hall, *Kua Tutu Te Puehe, Kia Mau: Maori Aspirations in Family Law*, in FAMILY LAW POLICY IN NEW ZEALAND 61 (Mark Henaghan ed., 1st ed. 1992); David Swain, *Family Group Conferences in Child Care and Protection and in Youth Justice in Aotearoa, New Zealand*, 9 INT’L J.L. POL’Y & FAM. 155 (1995).

41 Children Young Persons and Their Families Amendment Act 1994 (N.Z.).

42 Pauline Tapp & Nicola Taylor, *Protecting the Family*, in FAMILY LAW POLICY IN NEW ZEALAND, *supra* note 40, at 105, 113-17.

spouses were under a duty to live with one another, and this could be enforced by imprisoning the deserter, or by allowing one (in practice the husband) to forcibly constrain the other from leaving. This effectively conferred on the husband the power to decide where the couple should live.

This form of legal duty gradually eroded. Direct enforcement of “conjugal rights” had disappeared by the end of the nineteenth century, and indirect enforcement through awards of damages against adulterers by actions for enticement and harboring a spouse by the end of the twentieth.<sup>43</sup> The father still had sole legal authority to make decisions regarding his legitimate children by reason of his guardianship (unless a court ordered otherwise), but, as Stephen Cretney has pointed out, this probably had little impact on ordinary life.<sup>44</sup> It was abolished in 1973,<sup>45</sup> unnoticed by the general population and probably by many lawyers too.

Generally, however, at least in England, the state was reticent in giving legal form to the obligations family members owed to one another. This is in contrast to civil law systems, which still tend to set out family obligations in their family codes. However, things changed in times of social disturbance when family life itself underwent stress and threatened the wider community economically and socially, particularly when the household unit broke up. Following the disruption in charitable provision caused by the dissolution of the monasteries,<sup>46</sup> the Tudor period saw the beginnings of significant state intervention in the lives of the poor through the poor laws, consolidated in the Poor Relief Act of 1601. They gave the poor law authorities power to recover the costs of supporting a poor person from his or her relatives. The association between a policy of assigning obligations between family members, the force of law and protecting, or reducing, the state’s duties towards family members, persisted throughout the period of the poor law, and was later an important feature in the establishment of the Child Support Scheme in 1991.<sup>47</sup>

But sometimes obligations were created that increased state activity. For example, state norms were imposed (not without difficulty) with regard to education and compulsory vaccination.<sup>48</sup> But in these cases wider state interests

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43 STEPHEN CRETNEY, *FAMILY LAW IN THE TWENTIETH CENTURY* 142-61 (2003).

44 *Id.* at 196-250.

45 Guardianship Act 1973, c. 29 (Eng.).

46 N.S. Rushton, *Monastic Charitable Provision in Tudor England: Quantifying and Qualifying Poor Relief in the Early Sixteenth Century*, 16 *CONTINUITY & CHANGE* 9 (2001).

47 Mavis Maclean & John Eekelaar, *Child Support: The British Solution*, 7 *INT’L J.L. POL’Y & FAM.* 205 (1993).

48 GEORGE K. BEHLMER, *FRIENDS OF THE FAMILY: THE ENGLISH HOME AND ITS GUARDIANS 1850-1940* (1998).

were at stake, as when concerns about the fitness of the male population for military service during the Boer War, the influence of psychological theory on social work practice evident since the end of World War I and the emphasis on preventive social work after World War II combined so that, in Nigel Parton's words, "the public merges with, and interpenetrates, the private. The family, the school and the community itself are absorbed into and permeated by the newly developing and pervasive mechanisms of social regulation."<sup>49</sup>

The need to produce a citizenry competent to meet the economic and other needs of the community is a dominant theme justifying the imposition of legal obligations on parents as regards their children's education. A more recent version of this concern appears in the publication in March 2007 by the U.K. Labour government, *Every Parent Matters*, which proclaims: "Families bring up children. The role of government is to ensure that all parents, not just those for whom it comes naturally, are able to make confident, informed choices which they feel are right for their family."<sup>50</sup> It goes on to say: "[F]or a small minority of parents who have lost, or never have had, the capacity to parent responsibly . . . we have to accept that . . . compulsion for the few, through measures such as parenting orders, may sometimes be required to ensure that responsibilities to the children . . . are being properly fulfilled."<sup>51</sup> The motivation for this renewed attempt to affect the way parents bring up their children by imposing enforceable legal obligations on parents lies in fears that "a small minority" of parents have lost control over their children, and that this threatens social order.

New forms of legal regulation of family behavior have been emerging in the context of family breakdown as a result of pressures from parents, in particular, fathers, who risk losing, or at least seriously compromising, their relationship with their children when they separate from the mother. Perhaps the most striking recent attempt to regulate these family relationships through law is the Australian Family Law Amendment (Shared Parental Responsibility) Act 2006 which sets out three goals (including that "children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent with the best interests of the child"), five principles underlying the goals (including that children "have a right to spend

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49 NIGEL PARTON, GOVERNING THE FAMILY: CHILD CARE, CHILD PROTECTION AND THE STATE 8 (1991).

50 UK GOVERNMENT, DEPARTMENT FOR EDUCATION AND SKILLS, EVERY PARENT MATTERS 6 (2007), available at [http://www.mla.gov.uk/what/programmes/renaissance/regions/south\\_west/info\\_for\\_sector/~media/South\\_West/Files/2009/learning/Every\\_Parent\\_Matters\\_DfES.ashx](http://www.mla.gov.uk/what/programmes/renaissance/regions/south_west/info_for_sector/~media/South_West/Files/2009/learning/Every_Parent_Matters_DfES.ashx).

51 *Id.* at 7.

time on a regular basis with and communicate on a regular basis with both their parents as well as other people significant to their care”), and thirteen secondary considerations (including “the practical difficulty and expense of a child spending time with and communicating with a parent”; the “lifestyle, culture and traditions” of the child and parents; and “the attitude to the child” of the parents). Additionally, the court must apply a presumption that it is in the child’s best interests for the parents to have “equal shared parental responsibility” (except in some circumstances) and “consider whether the child spending equal time with each of the parents would be in the best interests of the child.”<sup>52</sup>

Yet imposing regimes within families through the law carries risks and comes at a cost. In the second half of the last century, the use of legal processes to adjudicate on the subtleties of moral and sexual behavior within marriage came to be seen as clumsy at best, disastrous at worst, hence the whole panoply of “fault” divorce has largely disappeared. The new Australian shared parenting provisions have resulted in complex judicial analyses,<sup>53</sup> and the greater willingness of courts to order children to be shared equally between parents who are seriously conflicted (as prompted by the new law) has been found to have detrimental consequences for the children.<sup>54</sup> The varied, but widespread, European systems conferring fixed rights of inheritance are under strain because of the conflict and complexity such rights can cause in the administration of estates.<sup>55</sup> The British attempt to enforce child support obligations through an administrative mechanism was deemed a failure largely because it could not cope with the fluidity of people’s lives, too much detail needing to be taken into account to reflect the complexity of family circumstances.

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52 See Reg Graycar, *Family Law Reform in Australia, or Frozen Chooks Revisited Again?*, 13 THEORETICAL INQUIRIES L. 241 (2012).

53 Frank Bates, *Notions of Parenting Emerge At Last — Australian Family Law in 2008*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 2010 EDITION 23 (Bill Atkin ed., 2010).

54 JENNIFER E. MCINTOSH & CAROLINE LONG, THE CHILD RESPONSIVE PROGRAM OPERATING WITH THE LESS ADVERSARIAL TRIAL: A FOLLOW-UP STUDY OF PARENT AND CHILD OUTCOMES, REPORT TO THE FAMILY COURT OF AUSTRALIA (2007), available at [http://209.85.229.132/search?q=cache:-qEjxFPADlkJ:www.familycourt.gov.au/wps/wcm/resources/file/ebc70245b4d525f/CRP\\_Follow\\_up\\_Report\\_2007.pdf+McIntosh+Long+family+court+australia&cd=1&hl=en&ct=clnk&gl=uk](http://209.85.229.132/search?q=cache:-qEjxFPADlkJ:www.familycourt.gov.au/wps/wcm/resources/file/ebc70245b4d525f/CRP_Follow_up_Report_2007.pdf+McIntosh+Long+family+court+australia&cd=1&hl=en&ct=clnk&gl=uk).

55 Jordi Ribot, *Deprivation of the Right to a Compulsory Share — When Family Solidarity Comes to an End*, Paper Presented at Regional Conference of the International Society of Family Law, Porto, Portugal (Sept. 2, 2009).

These examples illustrate that the mere fact that individuals may have moral or social obligations towards one another is not sufficient reason to make those obligations enforceable at law. The weight and application of moral norms are heavily contingent on nuances of context and individual circumstances which are difficult to reflect in legal forms and processes. Yet there is evidence that some writers and courts in certain European jurisdictions have recently supported claims for compensation payments by spouses against partners and sometimes third parties for breaches of a variety of “family obligations,” including infidelity, failures in sexual relationships, homosexuality, and other forms of marital disharmony.<sup>56</sup> Attempts to cast these in legal form, and to enlist legal bureaucracy and procedures in their enforcement, can be counterproductive. This may have something to do with the nature of law, which deals in abstract standards,<sup>57</sup> whereas the application of moral values is fine-grained.

This may be why it is difficult to treat families like business organizations and public bodies, such as universities. These are increasingly subject to government regulation. In the United Kingdom, for example, businesses must comply with laws dealing with health and safety, maternity, paternity or parental pay and leave, minimum pay, nondiscrimination on grounds of ethnicity, religion, gender, disability, and so on. Public bodies have to comply with these and many other provisions when carrying out their functions, such as to have due regard for promoting equality of opportunity between disabled people and other people, eliminating discrimination that is unlawful under the Disability Discrimination Act of 2005,<sup>58</sup> eliminating harassment of disabled people that is related to their disability, promoting positive attitudes to disabled people, encouraging participation by disabled people in public life, taking steps to meet disabled people’s needs even if this requires more favorable treatment, and monitoring their achievements in this regard. There are similar duties to promote good race relations.

Should family members be put under similar duties? Why should they not be compelled to promote these, and other, virtuous policies? After all, gender discrimination (against female children, for example) can be an issue in some families. Under this version of the delegation model, families would be expected to behave in the way the state would like them to behave, and family members (or state officials) given the power to compel others to

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56 Miquel Martin-Casals & Jordi Ribot, *Damages in Family Matters in Spain: Exploring Uncharted New Land or Backsliding?*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 2010 EDITION, *supra* note 53, at 337.

57 William Lucy, *Abstraction and the Rule of Law*, 29 O.J.L.S. 481 (2009).

58 Disability Discrimination Act, 2005, c. 13 (U.K.).

conform. There are three immediate reasons against doing this. First, law is a bureaucratic process. There would need to be provision for complaints; the process would need to be open to inspection or surveillance to ensure accountability, and so on, just as is required of organizations, whether in the public or private sectors. The legal framework of the workplace would be imported into the home. Secondly, imposing legal duties between family members can be a way in which the state attempts to offload to individual family members responsibilities that should be borne by the community. We have already noted the tendency of English law to “legalize” family obligations in order to reduce claims on public funds, and the concern that the New Zealand Family Group Conferences could undermine public child care provision. It is therefore interesting to observe that reforms that placed duties on family members to provide healthcare to elderly relatives adversely affected the quality of public health provision in Catalonia, and were subsequently reversed.<sup>59</sup> Thirdly, and paradoxically in view of the second objection, these structures essentially subsume the subordinate communal groups, like the family, into the total corporate state. It is easy to see the relationship between this model and corporatist political structures, of which fascism is one. Given these problems with the “delegation” model, the “purposive abstention” model may seem attractive.

### C. The “Purposive Abstention” Model

As stated earlier, in England the state has in general been content to permit families to act as units for the transmission of resources, both material and nonmaterial (such as knowledge and belief systems), between the generations. It simply provided the means by which families might do so. Unlike in Europe, English law did not specify how wealth was to be transmitted from parents to children. Alan MacFarlane has claimed that this practice promoted a form of individualism which explains the early growth of industrial capitalism in England.<sup>60</sup> Unlike most other societies in which children, or at least male children, are seen as prospective sharers of their parents’ property, in England the transmission of wealth was not automatic. There was freedom of testation, and no special concept of family property. So, unless specifically provided

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59 Jordi Ribot, *Family Law and Intergenerational Family Solidarity — Should There Be Enforceable Maintenance Rights Vis-à-vis Adult Relatives?*, in *FAMILY FINANCES* 33 (Beata Verschraegen ed., 2009).

60 ALAN MACFARLANE, *ORIGINS OF ENGLISH INDIVIDUALISM: FAMILY, PROPERTY AND SOCIAL TRANSITION* (1978); Alan Macfarlane, *On Individualism*, 82 *PROC. BRIT. ACAD.* 171 (1992).



otherwise, each individual in every generation had to fend for themselves. This makes for a flexible system, with strong freedom to deal in property on an individual basis, providing the context for an individualistic, capitalist, economic system.

Similarly, in English law, siblings and wider kin have no legal duty to support one another, and children have no legal duty to support their parents or grandparents, nor grandparents their grandchildren. Until relatively recently, even parents had no enforceable legal duty to support their children (provided their behavior fell short of cruelty or neglect). And although the common law did recognize a legal duty on a husband to maintain his wife, this was only indirectly enforceable while they were living together. This duty was formally abolished (without any replacement) by the Equality Act 2010.<sup>61</sup> Since this legal change is bound to pass unnoticed, nobody thinks that the social and moral norms regarding financial support between married (and unmarried) partners will be affected by this.

Lack of legal intervention could be the result of indifference as to how duties are allocated or performed within families. But feminist scholarship has long ago established that legal neglect of internal family dynamics reflected tacit support for male domination, which, as has been seen, was underwritten by the legal framework of the marital family. So it should not be thought that the wider community, simply by standing back, cannot be implicated in the practices of smaller communities within it. But refraining from legalizing family norms can also be humane and efficient. Within certain broad parameters, the allocation of resources within the household, or even within a wider family group, or between generations, could be best left to its members. Parents can be expected to act for the benefit of their children,<sup>62</sup> children for their parents, partners for their partner and their partner's parents, and relatives for the benefit of aunts, uncles and cousins, taking into account individual circumstances and subtle issues of fairness. Abstention can therefore be a tool of policy. For this reason I call it "purposive abstention."

It is very important to be clear about the scope of the "purposive abstention" model. Abstention is simply from converting norms that operate between family members into legal rights and obligations. It is not, as overzealous protection of family privacy might seek, total immunity from the law. Families must, and do, even in their dealings with one another, remain subject to the

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61 Equality Act, 2010, c. 15, § 198 (Eng.).

62 See ROBERT DINGWALL, JOHN EEKELAAR & TOPSY MURRAY, *THE PROTECTION OF CHILDREN: STATE INTERVENTION AND FAMILY LIFE* 78-102 (2d ed. 1995) (describing this as a "rule of optimism" applied by child welfare authorities as a means of restraint against unacceptable degrees of surveillance of family life).

general law (such as criminal law, contract and tort law, child protection law, education and health law, environmental law and property law). The state's duty to confer the protection and benefit of law, according to human rights standards, must be applied equally to all its citizens. Furthermore, the model does not exclude state policies that seek to influence the performance of these norms. In fact, the model can enhance the supportive role of the state, since, as has been observed earlier, imposing legal responsibilities between family members is a way by which the state can attempt to reduce its supportive role.

For example, this might involve intervening in the employment market in ways which are intended to affect the division of labor within families.<sup>63</sup> All of this is consistent with purposive abstention as understood here. So, while the law does not prescribe the appropriate division of labor or resources between couples, nor how, if at all, parents should instruct their children in religion, provisions concerning parental leave, social security and tax policy can influence the former, and religious groups seek to influence the latter. This can, of course, open up rich ground for contested territory, since external incentives, or penalties, could be even more effective than legal prescription in influencing behavior within families.

These are proper issues for social policy. Whether legal intervention is appropriate requires judgment in each case on the consequences of the malfunction of the social norms and, if intervention is chosen, the consequences of the mode of intervention proposed. So, when income support benefits to people aged from sixteen to twenty-five were restricted in the United Kingdom in the late 1980s and early 1990s, it was assumed that the previous recipients would fall back on their parents for support. The state did not impose a legal obligation on parents to bear the extra cost, for example, by paying the benefit and seeking to recover contribution from the parents. Presumably it was thought that most parents would bear some of the cost, and that the risks of hardship to the age group were not too severe. Similar judgments must be made regarding intervention in the parental upbringing of children. So, while judgment must be made on pragmatic grounds as to which technique is more effective, the "purposive abstention" model has many benefits as long as the norms are reasonably healthy.

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63 MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT AND AMERICA'S POLITICAL IDEALS* (2011); *see also* Maxine Eichner, *The Family and the Market — Redux*, 13 *THEORETICAL INQUIRIES L.* 97 (2012). I have earlier suggested three broad roles for family policy: support for family relationships, protection of members within families, and adjustment between members when families break down, *see* JOHN EEKELAAR, *FAMILY LAW AND SOCIAL POLICY* (2d ed. 1984).

#### D. Application of the Models in Culturally Diverse Societies

We can consider cultural groups as being meta-groups constituted of networks of families, within which, and between which, social norms operate. These norms can have value in promoting solidarity and self-sufficiency within groups. I have argued elsewhere that the models described above can be applied to state policies towards religious or cultural groups.<sup>64</sup> For example, the “authorization” model operates at a community level in those countries which permit religious groups to apply their own law as the “personal” law of their members. I have suggested that the “purposive abstention” model, which in the cultural context I called “cultural voluntarism,” should, as a general rule, be followed.

#### E. The Challenge of Contract

If there are benefits to be had by the law abstaining from casting family norms into legal form, how is one to respond if legal norms are imported into family relationships by the parties themselves through the law of contract? There are those who believe that marriage should be replaced by a contractual package which could govern as many aspects of intimate relationships (between two or more people) as the parties choose, although parent-child relationships would be excluded.<sup>65</sup> The likelihood is that such a model would potentially subject every aspect of domestic life to negotiation or renegotiation, within constraints similar to those of employment law. Many of the worries mentioned earlier with regard to the “delegation” model would arise in such conditions. In such a heavily legalized environment, one would fear for values like friendship, kindness and trust within personal relationships.

Yet in principle contract law, like other branches of the general law, can apply between family members. There must, of course, be an intention to create legal relations, along with other requirements of contract law. Some contracts between family members, especially concerning property and business dealings, need to be (and are) legally enforced, although they may attract special scrutiny to protect against unconscionability.<sup>66</sup> However, the need to protect wider social interests, and the interests of the parties themselves where the relationship breaks down, may require the interposition

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64 John Eekelaar, *From Multiculturalism to Cultural Voluntarism: A Family-Based Approach*, 81 POL. Q. 344 (2010).

65 See, e.g., Martha A. Fineman, *The Meaning of Marriage*, in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 29 (Anita Bernstein ed., 2008).

66 This is not always easy to achieve, however. See BELINDA FEHLBERG, *SEXUALLY TRANSMITTED DEBT: SURETY EXPERIENCE AND ENGLISH LAW* (1997).

of state norms to override those created contractually, in the same way as it has been shown that the state has intervened in the past when these interests have been threatened. As in those cases, the suitability of state intervention is a pragmatic matter. It certainly should not be ruled out.<sup>67</sup>

#### IV. CONCLUDING REMARKS

What conclusions are to be drawn from these reflections? The most important is to be aware that there is an “internal morality” to family life. The second is that the relationship between this morality and state law is highly complex and problematic. Where the state has imposed its “own” morality, particularly in regard to the personal relationship between spouses, the disconnect between legal norms and the more nuanced morality of individuals became increasingly glaring during the last century. The report by Miquel Martin-Casals and Jordi Ribot<sup>68</sup> that some commentators are arguing that courts should be prepared to cast moral and social norms relating to the conduct of personal relationships within marriage, and sometimes outside it, into legal forms, articulated by the judiciary and entailing pecuniary compensation when apparently breached, is extremely worrying because subjecting individuals who fail to conform to an idealized version of family living to the rigors and insensitivities of the legal process with potentially punitive outcomes is not only personally destructive; it opens intimate behavior to official scrutiny and injects state ideology into family life. It could be argued that the intrusion of legal rules into all aspects of life may blunt an individual’s capacity to develop a truly deep and rounded moral sense. It also excuses critics of such behaviors from scrutinizing the way society operates more widely and asking why people may be behaving as they do.

But law has played an increasing role when families have broken up. This has partly been because the results can impose costs on public finances, but also because a state’s legal system requires children to be protected and conflicts over the rights of separating adults to be resolved justly. But even here the role of the law has limits and idealized outcomes cannot always be imposed upon unwilling individuals. Law cannot provide a remedy for every hurt, or even every failure of social obligations. But that does not mean that states or other groups (or indeed individuals) external to families should not seek to ameliorate the consequences of such events and influence them.

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67 This position was particularly strongly expressed by Baroness Hale in *Radmacher v. Granatino*, [2010] UKSC 42.

68 Martin-Casals & Ribot, *supra* note 56.

They can go further and attempt to improve the quality of such relationships, as they see it. This Article is not intended to evaluate the merits of any particular policy in this regard. What I have sought to do is, first, to reassert, against the deluge of commentary depicting a society of disjointed, self-centered individuals, that family members are for the most part solicitous of the interests of one another and reflect this in their actions; and, second, that it is often better policy to build on such sentiments and allow families to behave in accordance with that inner morality than to try to clothe it in legal form. The general law, of course, continues to apply to all aspects of family life. But there seems nothing wrong, and indeed, everything right, with the state allowing people to recognize and act on the obligations they accept they are under towards their families.

