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Susanna and the Elders: A Note on the Regulation of Families*

Carol Weisbrod**

“. . . . [W]hat is all this story about?”

L. Sterne, *Tristram Shandy*¹

The story of Susanna and the Elders is presented through one optic as relating to viewing and the issue of legitimate and illegitimate voyeurism.² Paintings of Susanna and the Elders tell a story about lascivious old men viewing and even moving to rape a beautiful woman, vulnerable and naked at her bath.³ Through another optic, it is defined as concerning the sequestration of witnesses.⁴

The narrative offered by lawyers focuses on the trial scene, so that we imagine all participants clothed, speaking to each other, asking questions. Helmholz notes as to the use of the story by canonists that the story of Susanna and the Elders in the Book of Daniel was seen to vindicate a particular manner of receiving testimony, that is, by private and separate examination of each witness.⁵

The Book of Daniel recounts that when Susanna resisted the advances of the elders, they resolved to revenge themselves by accusing her of adultery with an imaginary young man. After Susanna had been condemned to death in an open trial, Daniel intervened. He questioned the two elders separately about the supposed crime. One

*© 1998, Carol Weisbrod. All rights reserved. This paper was delivered at the Conference on Family Governance held at the University of Utah College of Law in October, 1997. I benefitted from the conversation at this meeting. It continues a discussion begun in a 1993 article on family governance. See Carol Weisbrod, *Family Governance: A Reading of Kafka's Letter To His Father*, 24 U. TOL. L. REV. 689 (1993). It also draws on a paper given at the AALS session on family law in 1996. See Carol Weisbrod, *Three Axioms of Family Law* (1996) (unpublished manuscript on file with author).

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¹LAURENCE STERNE, *TRISTRAM SHANDY* 674 (Modern Library 1950).

²See R.H. CHARLES, 1 *THE APOCRYPHA AND PSEUDEPIGRAPHA OF THE OLD TESTAMENT IN ENGLISH* 647–51 (1963). Susanna and the Elders is part of the Apocrypha. See *id.* at vii. The Vulgate offers Susanna as Chapter 13 of *Daniel*. See *id.* at 639. Two versions of the story exist. Though substantially similar, they are not entirely identical. See *id.* at 638, 647–51; see generally, ROBERT H. PFEIFFER, *HISTORY OF NEW TESTAMENT TIMES* 67 (1949) (discussing the history of the stories of Daniel and Susanna).

³The story is a familiar subject in art, in part because of the visual opportunities it presented the artist. For modern feminist commentary, see MIEKE BAL, *READING REMBRANDT* 148–76 (1991); Mary D. Garrard, *Artemisia and Susanna*, in *FEMINISM AND ART HISTORY: QUESTIONING THE LITANY* 147 (Norma Broude & Mary Garrard eds., 1982) [hereinafter Garrard, *Artemisia and Susanna*]; MARY D. GARRARD, *ARTEMISIA GENTILESCHI* 173, 182–209 (1989) [hereinafter GARRARD, *ARTEMISIA GENTILESCHI*]; Kathryn Smith, *Inventing Marital Chastity* 16 *OXFORD ART J.* 3–24 (1993).

⁴See CHARLES, *supra* note 2, at 650 (quoting Daniel as saying “put them [the Elders] asunder one far from another and I will examine them”).

⁵R.H. Helmholz, *The Bible in the Service of the Canon Law*, 70 *CHI-KENT L. REV.* 1557, 1573 (1995) (discussing use of story of Susanna to justify manner of receiving testimony in the *ius commune*).

of them placed her action under a yew tree; the other under a clove tree. Thus was their perjury revealed and the life of an innocent woman saved. Proceduralists saw in this story clear support for their system of canonical procedure. If it had received God's blessing in this famous scriptural trial, how much more appropriate was it for the *ius commune*."⁶

We have in this story a family crisis in a structure that is not merely "extended" but is in fact a large household. A member of the family has been accused of something which the society judges a serious evil. In fact, she will die for her offense, if found guilty.

The story offers an opportunity to articulate three basic questions about family governance: first, how big is the family? second, who governs the family? and third, what is family law about?

I. HOW BIG IS THE FAMILY?

The changing definition of family involves a question of the size of the unit. The Susanna story, as understood over time, can be used to illustrate. The story begins: "There once lived in Babylon a man named Joakim. He married a wife named Susanna, the daughter of Hilkiyah, a very beautiful and pious woman. Her parents also were upright people and instructed their daughter in the Law of Moses."⁷ We note initially that only the father is named, which we may take as the linguistic formula which reflected the patriarchal system of the ancient biblical culture.

The story proceeds: "That year two of the elders of the people were appointed judges—men of the kind of whom the Lord said, 'Lawlessness came forth from Babylon, from elders who were judges, who were supposed to guide the people.'"⁸ The elders desired Susanna, but she rejected their advances.⁹ The elders then accused her of immorality with a young man.¹⁰

The judicial proceeding begins: "Send for Susanna, the daughter of Hilkiyah, Joakim's wife. . . . And she came, with her parents and her children, and all her relatives."¹¹ Thus, we add to the cast of characters her children, her relatives and also her bond servants. "And when the elders told their story, her slaves were deeply humiliated, for such a thing had never been said about Susanna."¹² The slaves were humiliated. Did they assume the accusation was true? If they had believed the accusation false, wouldn't they have reacted differently?

Susanna insisted on her innocence, but the elderly judges were believed and she was sentenced to death.¹³ Susanna appealed to God, "[a]nd the Lord heard her cry,

⁶*Id.* at 1573–74.

⁷EDGAR J. GOODSPEED, *THE APOCRYPHA; AN AMERICAN TRANSLATION* 349 (1938).

⁸*Id.*

⁹*See id.* at 350 (stating: "the two elders got up and ran to her" and asked her to lie with them, but she spurned them and "gave a loud scream," but "the two elders shouted against her").

¹⁰*See id.* at 351.

¹¹*Id.*

¹²*Id.* at 350.

¹³*See id.* at 351.

and as she was being led away to be put to death, God stirred up the holy spirit of a young man named Daniel, and he loudly shouted, 'I am clear of the blood of this woman.'¹⁴

Daniel's intervention, focused on the inconsistencies in the testimony of the elders¹⁵—what kind of tree was it under which the man stood with Susanna¹⁶—resulted in a finding of her innocence.¹⁷ "And Hilkiah and his wife praised God for their daughter Susanna and so did Joakim her husband and all her relatives, because she had done nothing immodest. And from that day onward, Daniel had a great reputation in the eyes of the people."¹⁸

Viewing the family as a small state, we are faced with some familiar questions: What is the answer? Who decides what is the answer? And who is we? Some issues in this context relate to the definition of the family itself. We can ask, for example: Who will vote on the substantive questions? Perhaps only those "within" the family. How do we determine this? Must the connection be marital? If not, are there limits on those associations which the family (and others) will allow to be considered "within" the family? Is there a collective notion of the "family council" which operates to shape or constrain the decisions of individual families on these issues?

Other questions relate to the substantive issues. For example: Does the family itself consider the behavior of which she is accused criminal? If yes, does the family believe that Susanna engaged in the behavior and that she should be punished? Should she for some reason be exonerated? Should she be helped to escape the main sanctioning system? Should the system be manipulated to achieve a favorable result, independent of her guilt or innocence in the eyes of the system? Should the family hire investigators who might turn up information on the accusers? Are there reasons on the basis of which her attackers and critics can be discredited? For example, would the possible impotence of the two old men induce them to defame her?

The narrative of the Apocrypha is silent on most of these issues. The husband, whose interest might be thought to be in the chastity or property of his wife, says nothing.¹⁹ His parents, who may well be players in life, do not appear. The servants

¹⁴*Id.*

¹⁵*See id.* at 352–53; JON R. WALTZ & ROGER C. PARK, *CASES AND MATERIALS ON EVIDENCE* 456–57 (8th ed. 1995) (using the story of Susanna and the Elders in a chapter on impeachment and cross-examination); 6 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AND COMMON LAW* § 1837, at 455–56 (James H. Chadbourne rev., Little Brown and Company 1976) (using the history of Susanna and noting that it "came to serve as a powerful argument in English courts").

¹⁶*See* GOODSPEED, *supra* note 7, at 352–53 (quoting Daniel's questioning of the elders). What kind of trees were they? Could the Elders have been wrong, even lying about the tree, but right about the adultery?

¹⁷*See id.* at 353.

¹⁸*Id.*

¹⁹*See id.* For a treatment of two fifteenth century Susanna plays, see Alan E. Knight, *The Stage as Context: Two Late Medieval French Susanna Plays*, in *THE STAGE AS MIRROR* 201 (Alan E. Knight ed., 1997).

Knight's comments are of interest:

When the Lille playwright, working from the Vulgate Bible, read that the multitude believed them as being the Elders and the judges of the people, he apparently understood the multitude to include Joakim. He therefore characterized the latter as a man profoundly saddened by the event, who asks Susanna whether he has hurt her or done anything to displease her. She tells

are ashamed of the accusation. Others are silent. Only Daniel, the inspired of God, had a voice that is worth attention. The legal system itself had a role, but an unfortunate one. The system believed false judges. And it reached conclusions which were incorrect.²⁰

The large size of the family-household is clear in the biblical narrative. Susanna's family-household included parents, husband, children, servants.²¹ This was a group which goes beyond our current nuclear family idea.²²

Representations of Susanna in paintings remind us of Maine's description of the shift from the large family-household of the Susanna story to the modern focus on individuals. Maine wrote, "the *unit* of an ancient society was the family, of a modern society, the individual."²³ Susanna in the Apocrypha is embedded in a household. In art, she is an individual woman, property of her husband, threatened with violence.²⁴

The paintings of Susanna and the Elders have provided, as one writer, Calvacoressi, observed, an "irresistible theme."²⁵ He explains,

Susanna herself has been depicted in a gamut of reactions: by Titian (Vienna, Kunsthistorisches Museum) admiring herself in a mirror; by Beronese (Prado) and Bassano (Nimes, Musee des Beaus Arts) surprised and recoiling; by Domenichino (Munich, Alte Pinakothek) surprised and grabbed; by Tintoretto (Prado) grabbed

him that she is blameless and that the Elders have accused her without cause. But at this point the playwright bows to the authority of his source and allows Joakim to lapse into silence until after Susanna is vindicated.

Id. at 213 (noting in one play reduction in size of Susanna's family).

Compare the husband's speech in Handel's oratorio, *Susanna*. See GEORGE FREDERIC HANDEL, *SUSANNA* 7-8 (Edwin F. Kalmus 1970) (1749) (depicting a Joachim who states, "Is Susanna false? [I]t ne'er can be. [D]etestet scroll, ne'er gain belief from me . . . Hence let me speed to Babylon's proud walls, where danger threatens and Susanna calls.").

Perhaps Joakim says nothing because his only stake is as a member of the society, which judges the crime. He does not, for example, have an independent right to forgive his wife's apparent infidelity.

Where would the dishonor have been if Susanna had gone with the Elders? Garrard sees the issue as dishonor to Joachim; Smith as a dishonor to Susanna herself. See GARRARD, ARTEMISIA GENTILESCHI, *supra* note 3, at 194 (indicating that Susanna's "sexuality was her husband's exclusive property"); Smith, *supra* note 3, at 3 (concluding that Susanna refused to submit because she was "[n]ot willing to dishonour herself"). Garrard suggests that the threat which the Elders posed was a threat to Susanna's reputation, rather than her life. See GARRARD, ARTEMISIA GENTILESCHI, *supra* note 3. Some of the artistic representations of Susanna, focusing on her beauty and, as Garrard notes, sometimes linking her visually to representations of Venus, *see id.* at 194-95, are a step in the direction of the flirtatious Susanna of Bridie's 1937 play, *Susanna and the Elders*, which includes a denunciation of Susanna by Daniel. JAMES BRIDIE, *SUSANNA AND THE ELDERS AND OTHER PLAYS* 62 (London Constable & Co. Pub. 1940) ("You are compact of folly and danger.").

²⁰See GOODSPEED, *supra* note 7, at 351.

²¹In the earlier text there is an enumeration including four children and 500 bondsmen and bondswomen. See CHARLES, *supra* note 2, at 649.

²²See HENRY SUMNER MAINE, *ANCIENT LAW* 128-29 (Ashley Montago ed., University of Arizona Press 1986) (1864).

²³*Id.* at 121 (emphasis added).

²⁴A number of commentators, ancient and modern, note that Susanna's "crying out" is required of a woman threatened with rape. Garrard notes that the "covert subject" of the Susanna theme in Western art is rape. See GARRARD, ARTEMISIA GENTILESCHI, *supra* note 3, at 192.

²⁵PETER CALVACORESSI, *WHO'S WHO IN THE BIBLE* (1987).

and fondled. Guido Reni's elders (Florence, Uffizi) get the closest look, while Guercino's (Madrid, Prado) are stealing up on her from behind, still unseen.²⁶

A recent generation of feminist art historians has been interested in the depictions from a somewhat more critical point of view. Some have stressed not merely the erotic interest of the theme,²⁷ but also have suggested the views of Susanna held by painters, who, as Garrard sees it for example, understand Susanna's dilemma as "whether or not to give in to her sexual instincts."²⁸

A major problem in any instance in which someone functions as a decision-maker relates to the development of the underlying factual story. What is the context in which the dispute arises? What is the relation between the present issue for decision and some statement of the past?

Briefly, there seems to be considerable uncertainty about what exactly happened in the garden between Susanna and the Elders. We are in the world of R.D. Laing: "The stories people tell ('people' here includes all people, parents, children, fellow social workers, psychiatrists, ourselves) do not tell us simply and unambiguously what the situation is. These stories are part of the situation."²⁹ Bal says that the Elders look at Susanna while thinking of seduction ("read rape," she says).³⁰ Others speak only of "advances" by the Elders.³¹ When Daniel settles that the Elders are lying by interrogating them separately concerning the fictional episode of Susanna's adultery with the young man, he does not resolve the issue of what happened in the Garden between Susanna and the Elders.

²⁶*Id.* For a version set in an American landscape, see THOMAS HART BENTON, *Susanna and the Elders* IN AMERICAN PAINTING 1900-1970 73 (Editors of Time-Life Books eds., 1970). I would like to thank Carolyn Jones for calling *Susanna and the Elders* IN AMERICAN PAINTING 1900-1970 to my attention. Garrard has said that Susanna's "expressive range runs from protest of a largely rhetorical nature to the hint of contrite acquiescence." GARRARD, ARTEMISIA GENTILESCHI, *supra* note 3, at 192. Garrard focuses on the contrast presented in the Gentileschi Susanna, attributing the work to Artemisia. *See id.* at 182-209 (commenting upon "the unusually well-defined resistance of Artemisia's Susanna").

²⁷*See* WALLACE STEVENS, *Peter Quince at the Clavier*, in THE COLLECTED POEMS OF WALLACE STEVENS 89-92 (1954).

²⁸GERRARD, ARTEMISIA GENTILESCHI, *supra* note 3, at 194. Garrard sees this also in the patristic idea of Susanna. *See id.* (suggesting that this focus "upon the secondary plot devices of temptation, seduction, and the erotic escapades of the Elders" was prominent in both the patristic and artistic conceptions of Susanna).

²⁹R.D. LAING, THE POLITICS OF THE FAMILY AND OTHER ESSAYS 33 (R.D. Laing ed., 1971).

³⁰BAL, *supra* note 3, at 149.

³¹It seems that the fundamental problem lies in the original two texts. The earlier and somewhat shorter version of the Susanna material says that the Elders "made advances to her and sought to constrain her." CHARLES, *supra* note 2, at 648. The later version—assumed to be Greek—which became the basis of the Vulgate, says that the Elders "rose up and ran unto her, saying . . ." *See id.* Kathryn Smith, who discusses representations of the Susanna story with an emphasis on issues of physical contact, and who notes the variations in the two texts, does not focus on this difference, noting only that the second version contains a longer discussion of the Elders' conspiracy to seduce Susanna. *See* Smith, *supra* note 3, at 8, 26 n.35. *See also*, Cheryl Smith Blum, *The Place of Art in Catharine MacKinnon's Feminist Legal Theory*, 19 J. CONTEMP. L. 446, 460-77 (1993) (discussing artistic renderings of the story of Susanna as possibly pornographic under MacKinnon's proposed definition). One solution to this problem is to start the account with the unjust accusation and avoid the issue of the underlying event. *See*, WALTZ & PARK, *supra* note 15, at 466 (beginning the story where the Elders accuse Susanna in front of the assembly). *See also, e.g.*, 15 JERUSALEM ENCYCLOPEDIA JUDAICA 532 (1974) (same).

These issues do not yet reach complex questions of motivation and characters: whether Susanna lusted after the elderly men as they lusted after her; whether their threat was in effect a death threat (if she was convicted of adultery); or whether, as Garrard suggests, they threatened her with a scandal and damage to her reputation.³² Further, we have not yet dealt with issues which might arise if we found that she was threatened with violence and rape. This case is not the one of adultery which might result if Susanna, more ambiguously, "yields" to the elders.³³

A part of the Susanna story is about the issue of family governance, a term which can mean either governance of the family by agents and actors outside the family group, or self-governance by actors and agents, alone or in combination, inside the group. If we think of variations on the story of Susanna and the Elders from the point of view of the individuals involved, we may consider a possibility in which she is an unmarried woman, without children, who makes her decisions essentially alone.³⁴ She will fight the Elders in court by herself. Or we may see her unmarried, but linked to a mother, father, or siblings. Or married and still linked to a mother or father or siblings. Even unmarried, Susanna might broker with her parents. The woman who is married might or might not broker with her parents. The husband might broker with his wife in relation to her parents. Or he might remain in the background, assigning her a script for her to use with her parents, so that she becomes the intermediary between her husband and her parents rather than an independent player.

Other variations might relate to her children at different ages. While her role as mother would presumably be important throughout, the role of the child as a player with serious input into the decision would presumably be greatly influenced by the

³²Garrard thinks that Susanna's "total fidelity to Joachim is demonstrated in her willingness to accept death rather than dishonor him by yielding to the Elders." GARRARD, ARTEMISIA GENTILESCHI, *supra* note 3, at 194.

³³See CHARLES, *supra* note 2, at 648. In the earlier version, Susanna says, when threatened by the elders, "I know that if I do this it is death to me." *Id.* at 648 & 648 n.2 (A footnote to the quoted line indicates that death is the penalty imposed on the wife for unchastity, and that it would be death by stoning).

³⁴*Cf.* Susan B. Anthony, *The Homes of Single Women*, in ELIZABETH CADY STANTON / SUSAN B. ANTHONY: CORRESPONDENCE WRITINGS, SPEECHES 146, 148 (Ellen Carol Dubois ed., 1981) (arguing that "'the logic of events' points, inevitably, to an *epoch of single women*" who must "make comfortable and attractive homes for themselves").

age of the child. But the child might contribute and even dominate,³⁵ becoming a critical decision maker while still technically a minor.³⁶

One large variation, as Maine noted, reduces the issue of power in the family—an issue of many individuals in relation to each other—to two people, husband and wife in a loosely conceived “patriarchal system” of female subordination.³⁷

Our own generation’s telling of the story of family governance, while adding a highly significant factor in its focus on women in the family, has as a weakness the reduction of many issues in the family to problems in the nuclear couple. The focus on such issues as marital rape, spousal abuse and work-family relations while raising children in a two parent household,³⁸ has tended to limit our interest in the larger kinship group.³⁹ It is not only society, in general, which provides a setting for these

³⁵See D.W. Winnicott, *Hate in the Countertransference*, in COLLECTED PAPERS: THROUGH PAEDIATRICS TO PSYCHO-ANALYSIS 194, 200–02 (Bruner / Mazel 1992) (listing, among the reasons that mothers hate their infants, the fact that infants dominate their mothers). See also, ROBERT H. MNOOKIN, CHILD, FAMILY AND STATE 1 (1978) (suggesting that in the modern situation, reversing a state of things assumed by John Stuart Mill, children “may dominate the experience of their elders”). For an indication that adults are aware of their roles as parents even when operating in professional contexts see, e.g., Jeremy Paul, *Bed Time Stories*, 74 V. L. REV. 915 (1988).

Children might be perceived as property as well, an idea carried to one logical conclusion by Jonathan Swift, who suggested that the landlords, “hav[ing] already devoured most of the parents, seem to have the best title to the children.” JONATHAN SWIFT, A MODEST PROPOSAL AND OTHER SATIRICAL WORKS 54 (1729, 1996).

³⁶On a presumption of competence for minors from the point of view of an individualist-anarchist, see 1 Lysander Spooner, *A Letter to Grover Cleveland*, in COLLECTED WORKS OF LYSANDER SPOONER 59, 61 (Biography and Introductions by Charles Shively, 1971).

³⁷See Maine, *supra* note 22, at 163. Maine began with the famous status to contract idea: The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account . . . Starting, as from one terminus of history, from a condition of society in which all the relations of persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals.

Id. We may note the assumption of historical patriarchal rule was that some specific man, not necessarily the husband, governed the family. See *id.* (noting that, in archaic society, “persons theoretically amalgamated into a family by their common descent [were] practically held together by common obedience to their highest living ascendant, the father, grandfather, or great-grandfather”). Maine’s account of the movement from status to contract makes the point that in fact the husband, to the extent that he was a son, might have a very limited voice in the private side. See *id.* at 133 (noting that law, during that period, caused a husband to live “under a domestic despotism” in all his relations created by private law).

³⁸That is, “household” provides a synonym for “family.” See e.g. WILLIAM J. GOODE, THE FAMILY 44–55 (1964) (discussing forms of households as instructive on nature of family unit); J.E. GOLDTHORPE, FAMILY LIFE IN WESTERN SOCIETIES 19–23 (1987) (discussing the size and composition of households in a chapter on family life in past).

³⁹See Tamar Lewin, *Study Criticizes Textbooks on Marriage as Pessimistic*, N.Y. TIMES, Sept. 17, 1997, at A24 (suggesting that a generally negative view of marriage may be part of a present focus on issues of divorce and domestic violence).

matters. Larger family constellations, including some with strong matriarchal traditions, surround the couple and influence their family life.⁴⁰

The 1953 case, *McGuire v McGuire*,⁴¹ holds that a wife cohabiting with her husband could not sue for support because the cohabitation provided presumptive evidence that the support obligation was being met.⁴² Its subtext, that the nuclear family is centrally the place in which the battle of the sexes was played out, became a popular "horror story" as Martha Fineman discussed it, as early as 1978.⁴³ It continues to be a major narrative in our discussion of power relations in the family and the law's reinforcement of power in the family.⁴⁴ Family law became the field of law which, despite formal political equality, carried the burden of the standard social role differentiation usually described as "separate spheres."⁴⁵ Women have, in effect, been the last to escape from the family into the public world.⁴⁶

As noted, the *McGuire* case was discussed by feminist lobbyists as part of women's equality campaigns.⁴⁷ Its link to issues of domestic violence can be seen if we ask the question: What happened when the McGuires went home? Does she become an abused wife, face to face with an enraged (and now vindicated) husband? What happens as he—as of course he will—becomes increasingly dependent over time?

The *McGuire* case does not give any indication of the bases on which family decisions might be rendered, nor does it say anything about the relationship between

⁴⁰This is not because the law gives them the "right" to do so, but because the rules of family life give them the psychologically based power to do so.

⁴¹59 N.W.2d 336 (Neb. 1953).

⁴²See *id.* at 342.

⁴³See Martha Fineman, *Implementing Equality*, 1983 WIS. L. REV. 789, 855 n.188 (citing WISCONSIN GOVERNOR'S COMMISSION ON THE STATUS OF WOMEN, REAL WOMEN REAL LIVES: MARRIAGE, DIVORCE, WIDOWHOOD 43-45 (1978)); see generally Blanche Crozier, *Marital Support*, 15 B. U. L. REV. 28 (1935) (recognizing the significance of issues raised in *McGuire*). Some of Crozier's writing has a very contemporary—which is to say angry—sound: "This is precisely the situation in which property finds itself; it may be overworked and underfed, or it may be petted and fed with cream, and that is a matter for the owner to decide." *Id.* at 33. A different equality issue related to the fact that the law imposed a support obligation only on men. The substance of family law and the narrative of its history was then linked to the history of women and the struggle for women's emancipation.

⁴⁴As evidenced by this symposium itself.

⁴⁵Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1133, 1144 (noting that the separate sphere relegates women "to a stifling and limited routine") [hereinafter Teitelbaum, *Family History*].

⁴⁶See LESLIE J. HARRIS, LEE E. TEITELBAUM & CAROL A. WEISBROD, *FAMILY LAW* 983 (1996) (quoting Max Stirner).

⁴⁷See generally Fineman, *supra* note 43, at 855 n.188 (discussing use of *McGuire* by feminist reformers); Teitelbaum, *Family History*, *supra* note 45, at 1174-75 (criticizing the *McGuire* Court's refusal to resolve an intra-spousal financial dispute upon the policy of family autonomy or privacy); see also discussions of *McGuire* in CARL E. SCHNEIDER & MARGARET F. BRINIG, *AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS AND PERSPECTIVES* 252-55 (1996); Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 UTAH L. REV. 537, 541-42 [hereinafter: Teitelbaum, *Family as a System*].

the law's traditional priority to men⁴⁸ and actual on-going power relations in any particular family.

The distinction had been clear in the nineteenth century discussion. Thus, "[i]n respect to the powers and rights of married women, the law is by no means abreast of the spirit of the age," William Story wrote.⁴⁹ He continued:

Here are seen the old fossil foot-prints of Feudalism. The law relating to women tends to make every family a barony, or a monarchy, or a despotism, of which the husband is the baron, king, or despot, and the wife the dependent, serf or slave. . . . [I]f the husband choose, he has his wife as firmly in his grasp and dominion, as the hawk has the dove upon whom he has pounced. The age is ahead of the law.⁵⁰

However, Story notes, "[p]ublic opinion is a check to legal rules on this subject."⁵¹

A common account of the modern family continues to see the balance of power in terms of hawk and dove. Women are seen as victims in fact throughout the story or until very recently.⁵² There is, however, this difference: If Story's assumption was that the practice of individuals was better than the legal standard required, our modern assumption may well be that the practice of the couple is worse than the law requires. Like Story, we assume male dominance, though sometimes we also see that there are in fact mother-dominated families, even in two-parent families.⁵³

Our discussion of power in the family is often thin, failing to address either socioeconomic factors or ideas of relative power, or even ideas of individual variation. As to the roles in the family, as the sociologist A. E. Ross observed many decades ago, much of what we are looking at may have to do with the shift of the

⁴⁸See MAINE, *supra* note 22, at 149 (noting that "[a]ncient law subordinated the woman to her blood-relations, while a prime phenomenon of modern jurisprudence has been her subordination to her husband"). The incapacity of women in private law was associated with marriage. In the public context, incapacitation was based on gender.

Maine's approach sees the legal power in the husband because of coverture: "The status of the Female under Tutelage, if the tutelage be understood of persons other than her husband, has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract." *Id.* at 164. Aside from that, women are individuals, who operate as contracting partners. The issue was not women, then, but married women.

⁴⁹WILLIAM WETMORE STORY, *TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL* 74 (2d ed. 1847).

⁵⁰*Id.*

⁵¹*Id.*

⁵²As to this, one might recall the comments of John Stuart Mill on the power of the scold as a form of retaliation.

I grant that the wife, if she cannot effectually resist, can at least retaliate; she, too, can make the man's life extremely uncomfortable, and by that power is able to carry many points which she ought, and many which she ought not, to prevail in. But this instrument of self-protection—which may be called the power of the scold, or the shrewish sanction—has the fatal defect, that it avails most against the least tyrannical superiors

JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 37 (Sue Mansfield ed., 1980) (1869).

⁵³See ROBIN SKYNNER & JOHN CLEESE, *FAMILIES AND HOW TO SURVIVE THEM* 197 (1983) (suggesting that the pattern of mother-dominated families might not be a result of castrating mothers as much as fathers opting out of responsibility).

household from a production to a consumption unit.⁵⁴ Our version of the power of the husband and the powerlessness and victimization of the wife may well be historically contingent.⁵⁵

Around the couple itself, there are frequently other people with an interest in the questions. These persons support one side or another, and may have, by their example and teaching, done one thing or another to frame the issues and influence or even dictate the answers to the questions.⁵⁶ We see these people occasionally in legal materials, the grandmother in *Moore v City of East Cleveland*,⁵⁷ the aunt in *Prince v Massachusetts*.⁵⁸ Arland Thornton observes "that while family units have sometimes been as small as two individuals, families more typically have included additional members."⁵⁹ In fact, he writes, "most family systems have recognized substantial numbers of relatives and relationships."⁶⁰

Clearly then, we are always talking about larger and small family units, and law recognizes both. Sometimes law focuses on the couple and the immediate nuclear family. At other times, however (for example, inheritance, incest, relative support), it may think differently about the size of the family.

⁵⁴See EDWARD ALSWORTH ROSS, *THE SOCIAL TREND* 90-91 (1922) (noting that industrial decay of home has caused wife to lose her economic footing, and that "[a]part from motherhood, her role is chiefly ornamental").

⁵⁵Ross states:

Observe, too, how it is nowadays between husbands and wives. When with spinning, weaving, knitting, churning, pickling, curing, and preserving, the home was a workshop, the wife was not "supported" by her husband. He knew the value of her contribution and took her seriously, even if he did belittle her opinions on politics and theology. But, with the industrial decay of the home, it is more and more often the case that the husband "supports" his wife. In the well-to-do homes—and it is chiefly here that the status of women in general is determined—the wife has lost her economic footing. Apart from motherhood, her rôle is chiefly ornamental. The husband is the one who counts, whose strength must be conserved, who cannot afford to be sick. Of course, much emphasis is laid on the wife's maternal contribution. But, aside from the one wife in six who rears no child, will wives feel and be able to persuade men that the bearing and rearing of three or four children offsets forty or fifty years of maintenance? Grandmother bore on the average six or eight children besides performing a hundred tasks which never present themselves in the modern household.

It is a cherished bit of make-believe that the husband is compensated by his wife's graces, her accomplishments, her culture, her social and public activities; that the "companionship" of so fine a creature is an equivalent for all she costs. But will nothing of patronage creep into the attitude of the bread-winner toward his unproductive mate? Having given up the rôle of busy Martha, is it not up to her to assume the rôle of the adoring Mary?

Id. at 90-91.

⁵⁶ See GOODE, *supra* note 38, at 45 (stating "[a] mother-in-law may continue to supervise the socialization of a young daughter-in-law or a young boy may go to his mother's brother's house to grow up").

⁵⁷431 U.S. 494 (1977).

⁵⁸321 U.S. 158 (1944).

⁵⁹Arland Thornton, *Comparative and Historical Perspectives on Marriage, Divorce, and Family Life*, 1994 UTAH L. REV. 587, 602.

⁶⁰*Id.* See also GOODE, *supra* note 38, at 51 (stating that the nuclear "family unit maintains contact with a wide range of relatives" in the larger kinship group).

As noted, William Story's comments in 1847 are typical of the focus on the couple and the smaller version of the family,⁶¹ a focus that is common in modern feminist writings.⁶² But, some social science discussion indicates that issues of dominance and submission are not automatically to be superimposed on categories of gender or age. Timasheff has written:

A social group in which the power phenomenon appears is a polarized group consisting of two correlated elements: the active (dominators) and the passive (subjects). Its twofold character is clearly expressed by the term "dominance-submission." The polarization is a kind of "law of nature" which is observable whenever individuals of certain types come in contact. This law applies to animals as well as to men.

As regards human beings, the relationship of dominance-submission may be observed even in the simplest social groups composed of two persons: a married couple, in case either the husband or the wife dominates (of course not every married couple stands in a power relation); two friends, one of whom is the leader and the other his satellite; two playmates in a like relationship; a master and a servant, et cetera.⁶³

We can imagine, in short, different law-givers, powerful in-laws acting alone or through a child or siblings, or cousins. And we can project different outcomes, depending on the belief of the law-giver and the guilt or innocence of Susanna. Such variations on the story of Susanna are not variations of the plot, but simply variations in the cast of characters. They are raised here simply to indicate that the issue of decisions in the family, often discussed in the modern literature with a focus on the nuclear family or the relations between one child and his or her parents, in a male dominated family, does not adequately deal with the empirical possibilities.

Recent scholarship has stressed the stability in family structure represented by the idea of the household—a conjugal family raising children.⁶⁴ But perhaps we should now turn our attention also to the larger kinship groups around this household. This question would seem to be particularly important if we connect it to the idea of will—dangling on the one hand, representing a coercive power in the extended kin network and the possibility of aid and assistance through the same larger network on the other. Both of these may be more significant in the American situation than is assumed in the emphasis on the couple and the nuclear family. This is so, even without reaching questions of the patterns of ethnic groups and subgroups, where

⁶¹See *supra* notes 49–51 and accompanying text.

⁶²At the same time, there are academic writings which stress the significance of some larger groups. See, e.g., generally Irwin Alman, *Polygamous Family Life: The Case of Contemporary Mormon Fundamentalists*, 1996 UTAH L. REV. 367; Margaret F. Brinig, *The Family Franchise: Elderly Parents and Adult Siblings*, 1996 UTAH L. REV. 393; Teitelbaum, *Family as a System*, *supra* note 47, at 537; Barbara Bennett Woodhouse, "It All Depends on What You Mean by Home": *Toward a Communitarian Theory of the "Nontraditional" Family*, 1996 UTAH L. REV. 569.

⁶³N.S. TIMASHEFF, AN INTRODUCTION TO THE SOCIOLOGY OF LAW 172 (1939).

⁶⁴See Teitelbaum, *Family as a System*, *supra* note 47, at 538–40 (noting that nuclear family is not a new form).

such alternative patterns are sometimes assumed, such as informal adoptions among sub groups.

When we equate "family" and "household" we follow the approach of the social historian of the family. The rule of the household is described this way: "[N]o two married couples or more went to make up a family group When a son got married he left the family of his parents and founded one of his own. If he was not in a position to do this, then he could not get married" ⁶⁵

This usage of family as household, while it describes the nuclear conjugal family, plainly does not describe other usages of "family," for example those in which our parents and siblings and their children are part of our family, as well as our spouse's parents, siblings and their children. Edmund Gosse commented on his father's dominance in his early life: "As I look back at this far away time, I am surprised by the absence in it of any figures but our own. . . ." ⁶⁶ We might also be surprised at the tight frame of reference we use for the family. ⁶⁷

This is an issue of importance for law. To say that the right to decide goes to the person(s) most directly concerned is quite different from saying that no one else is concerned. And I do not mean here "society" or the "state," both often said to be concerned parties in family law. Rather, I mean other people in our larger kinship groups or in our "quasi-associations." If we acknowledged their existence in our family narratives, we would be less surprised when they arrive in court to ask for custody or visitation rights. Perhaps they should not be awarded custody or visitation, at least not over the objection of those with greater claims. ⁶⁸ But if we, in public and private roles, saw and heard them, some people at least, again in various contexts, might find it possible to recognize their interests as a matter of comity, if not right. It is for example the distinction between the marital or conjugal family and the larger kinship network which makes possible the idea that divorce relates to a change in the relationship in the couple but does not necessarily involve the destruction of the family. And some might find it more normal, less bizarre, to think that some configuration other than the compact nuclear family could be possible. We might also be better able to explore the consequences of the point that the spheres of intimate life and family life, while they may overlap, are not identical.

II. DANIEL: WHO GOVERNS THE FAMILY?

Daniel is not a member of Susanna's family and he is not a representative of the official legal system surrounding the family. In modern terms, we would say that, representing a religion, he was a representative of a "mediating institution," between

⁶⁵PETER LASLETT, *THE WORLD WE HAVE LOST* 90 (1965).

⁶⁶EDMUND GOSSE, *FATHER AND SON* 95 (1974).

⁶⁷Work on groups and community pushes at this issue also. See, e.g., AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* 137-44 (1995).

⁶⁸See THEODORE ROETHKE, *Elegy for Jane*, in *THE COLLECTED POEMS OF THEODORE ROETHKE* 98 (Anchor Books, 1975) (1966). The final stanza in *Elegy for Jane*, reads: If only I could nudge you from this sleep, / My maimed darling, my skittery pigeon. / Over this damp grave I speak the words of my love: / I, with no rights in this matter, / Neither father nor lover. *Id.* The speaker is [only] a teacher.

the state and the individual. But it is perfectly plain that Daniel does not really in the story of Susanna, represent anything intermediate to anyone human. Daniel is a divine representative in the Apocrypha. As he would emerge today, Daniel would be less a carrier of the Divine voice and more a church official.

As a divine representative, Daniel is not simply a wise judge whose decisions are informed by the religious tradition. Rather, he is someone who has a direct line to Divinity. And thus he knows, in advance, that Susanna is innocent.⁶⁹ Generally speaking, this is knowledge we do not have. “[I]t is current doctrine that the age of miracles is past,” Karl Llewellyn wrote in *The Bramble Bush*.⁷⁰

Wigmore tells a secular version of the Susanna story, omitting the references to Susanna’s appeal to God and God’s appointment of Daniel altogether.⁷¹ We go from “the assembly believed [the Elders]” to Daniel, “standing in the midst of them, said: . . . ‘Are ye such fools?’”⁷² This stance makes possible Wigmore’s odd interpretation of some of Daniel’s speeches. Wigmore was concerned about the “vituperation”⁷³ and “disconcerting anathema”⁷⁴ in the Susanna story, in which Daniel predicts the downfall of the Elders. Wigmore attributes this to Daniel’s “desire to anger and confuse the witness, preventing him from recollecting the details of his story if he had invented one.”⁷⁵ But Daniel knows that Susanna is innocent, and knows therefore that the story is invented. He is more likely, then, to be denouncing the Elders because they deserve denunciation.⁷⁶

The proposition that a divine will directly regulates the family is linked for some to the problem of the Akeda, and the command to Abraham to sacrifice Isaac.⁷⁷ American family law history⁷⁸ includes direct use of the story of *Genesis*. Thus, in 1879, Charles Freeman killed his young daughter, Edith, believing that this sacrifice has been divinely commanded, and that the child would rise on the third day.⁷⁹ Freeman had consulted his wife and, after some deliberation, had concluded that this was a test, like the test of Abraham, recounted in *Genesis*.⁸⁰ One hundred years later,

⁶⁹See CHARLES, *supra* note 2, at 650 n.51b.

⁷⁰K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 38 (1969).

⁷¹See WIGMORE, *supra* note 15, § 1837, at 455–56.

⁷²*Id.* at 455.

⁷³*Id.* at 456 n.3.

⁷⁴*Id.* at 456 n.4.

⁷⁵*Id.* at 456 n.3.

⁷⁶See CHARLES, *supra* note 2, at 650 n.51b. I do not mean to suggest that all modern expositions of the Susanna story omit the element of inspiration. Nonetheless, the omission provides a parallel to our modern church-state doctrine in a way that seems worth some attention.

⁷⁷See *Genesis* 22:2. Among recent treatments, see Martha Minow, *Child Endangerment, Parental Sacrifice: A Reading of the Binding of Isaac*, in *BEGINNING ANEW: A WOMAN’S COMPANION TO THE HIGH HOLY DAYS* 145, 145–53 (Gail Twersky Reimer & Judith A. Kates eds., 1997); George Steiner, *A Conversation Piece*, in *PROOFS AND THREE PARABLES* 101, 101–14 (Penguin Books 1993) (1992).

⁷⁸On that history in general, see below.

⁷⁹See Carol Weisbrod, *Charles Guiteau and the Christian Nation*, 7 *J.L. & RELIGION* 187, 216 (1989).

⁸⁰This account is taken from *id.* at 216–21 (citing Folsom, *The Case of Charles F. Freedman of Pocasset, Mass.*, 40, *AM. J. INSANITY* 353–63 (1884). Freeman was found insane on the basis of a hearing held in 1879 and declared unfit for trial. He was in an institution at the time of the Guiteau trial. Freeman was finally tried in 1883. Following his acquittal, Freeman, though then legally sane, was hospitalized

it is still true that cases of divine command arise with reference to parents killing children and that the insanity issue is raised.⁸¹

A modified version of the divine command issue arises when we say that the entire family sees itself as under the authority of religious law. All are committed to that regulatory system, which has something to say about who in the family takes precedence on various points. A conventional hierarchy would be husband, wife, child.

Today, as much as in the time of the biblical narrative, the family may submit itself to church sanctions. Shunning is particularly well-known, with obvious effects on the family.⁸² John Hostetler and Gertrude Huntington describe Amish shunning as follows:

Excommunication and shunning (Bann und Meidnung) are the church community's methods of dealing with obdurate and erring members and of keeping the church pure. . . . The Anabaptist concept of the church was of a pure church consisting of believers only; persons who violated the discipline were first to be excommunicated, then shunned. This method of dealing with offenders, the Amish say, is taught by Christ (Matt. 18:15-17), and explained by the Apostle Paul (1 Cor. 5:11); that members must not keep company with unrepentant members nor eat with them.⁸³

Sometimes, the submission of the family to the authority of the religion results in a conflict with state authorities. In a recent Nebraska controversy, we see a modern version of the issue. The divine will is now interpreted through religious authorities and linked to strong cultural traditions. In a recent Nebraska story the young daughter's complain, defining themselves as aggrieved by the traditional rules

pursuant to the Massachusetts statute of 1873, which provided that a prisoner should be kept in confinement "until it appears to the Governor and Council that he may be discharged and set at large without danger to others." *Id.* at 217 n.119 (quoting *Gleason v. Inhabitants of West Bolyston*, 136 Mass. 489, 490 (1884)).

⁸¹See John Makeig, *Mother Acquitted on Grounds of Insanity in Killing of Child*, HOUS. CHRON., Mar. 11, 1998, at A1. The death of children through exorcism is occasionally reported. See Matea Gold, *Women Convicted of Killing Girl in Exorcism*, L.A. TIMES, Oct. 15, 1997, at B1.

In the Jewish tradition, there is an argument that one should not rest one's judgments on divine command. See Izhak England, *Majority Decision vs. Individual Truth*, 15 TRADITION Spring-Summer 1975, at 137. In the story of the Oven of Achnai, the Divine Voice says: "Why do you disagree with Rabbi Eliazar. [sic] The Halakhah is always as he says it is." *Id.* at 138.

⁸²See *Bear v. Reformed Mennonite Church*, 341 A.2d 105, 106 (Pa. 1975) ("Shunning, as practiced by the church, involves total boycotting of [an ex-member] by other members of the church, including his wife and children, under pain that they themselves be excommunicated and shunned.").

⁸³JOHN A. HOSTETLER & GERTRUDE ENDERS HUNTINGTON, *AMISH CHILDREN* 11-12 (2d. ed. 1992). Hostetler and Huntington then describe several kinds of shunning.

The practice of shunning among the Swiss Mennonites was to exclude the offender from communion. A more emphatic practice was advanced by Jacob Amman. His interpretation required shunning excommunicated persons not only in the communion service but also in social and domestic relationships. Shunning means that members may receive no favors from an excommunicated person . . . and that no member shall eat at the same table with an excommunicated person. If the person under the ban is a husband or wife, the couple is to suspend their marital relations until the erring member is restored to the church fellowship.

Id.

because they perceive an assimilation option as desirable.⁸⁴ The essence of the controversy is caught in a headline: "They say marriage; law says rape. Two Iraqi immigrants are on trial in Nebraska. Their wives are ages 13 and 14."⁸⁵

A newspaper account suggests the complexities:

The young Iraqi sisters spoke in English that would have made their American teachers proud, tossing in a bit of teenager idiom, picked up in the Lincoln middle schools, for good measure.

Their husbands, also Iraqi immigrants, looked perplexed. A translator rendered in an Arabic dialect all of the young brides' unpleasant testimony about their much-older husbands.

[A lawyer for the young brides] said she "believed the girls' father and mother arranged their daughters' marriages because the girls were adapting too readily to American ways. Arranging their weddings to Iraqi men was a way of keeping the girls from going astray culturally."⁸⁶

The girls' parents were charged with misdemeanors and, in addition, the father was charged with two counts of child neglect and the mother with debauching a minor.⁸⁷

The case of the Iraqi immigrants may be seen in terms of a cultural defense question, rather than an issue of religious rights, but in fact a combination of religious and cultural ideas seems to be at work, and it was reported that the case was seen "in the Arab world" as a case of "religious persecution."⁸⁸

Family law has, at one level, always conceded the existence of legal systems outside the state. Modern family law was built in a system of law in which, in England, ecclesiastical courts had jurisdiction over marriage and divorce until the mid-nineteenth century. But while it is conventional to say that state law exists in the context of much other regulatory material emanating from private groups,⁸⁹ it is common for the sentence to be said and then ignored, in the interest of an emphasis on the state legal system. Law is state law. Reform, with some exceptions, is reform

⁸⁴See comments of Lawrence Friedman on a comparable issue in Lawrence M. Friedman, *The War of the Worlds: A Few Comments on Law, Culture and Rights*, 47 CASE W. RES. L. REV. 379 (1997) (discussing issue of female circumcision).

⁸⁵Larry Fruhling, *They say marriage; law says rape*, DES MOINES REG., Jan. 5, 1997, at 1, available in 1997 WL 6933843.

⁸⁶*Id.*

⁸⁷*See id.* The older girl was placed in a home for girls, and the younger was placed in foster care. *See Therapy ordered for man who made daughters marry*, DES MOINES REG., June 14, 1997, at 10, available in 1997 WL 6953887. The parents were ordered to undergo counseling and therapy. *See id.* The men pleaded guilty to first-degree sexual assault of a child. *See Iraqi men's sentences planned for September*, DES MOINES REG., July 27, 1997, at 13, available in 1997 WL 6961216. They were sentenced to four to six years. *See Prison Terms for 2 Men In Marrying Young Girls*, N.Y. TIMES, Sept. 24, 1997, at A14.

⁸⁸*See*, Fruhling *supra* note 85, at 1. *Cf.* Singh v. Singh, 2 All E.R. 828 (C.A. 1971) (dismissing seventeen-year-old wife's petition to annul arranged Sikh marriage because wife failed to establish duress or invincible repugnance).

⁸⁹Often religious groups. *See, e.g.*, PHILIP A. RYAN & DOM DAVID GRANFIELD, DOMESTIC RELATIONS: CIVIL AND CANON LAW 36-41 (1963); 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 436 (1968) ("To the canonist there was nothing so sacred that it might not be expressed in definite rules.").

of state law.⁹⁰ Lawyers were quite comfortable with the version of pluralism offered by the political scientists to the effect that all private groups are best understood in terms of competition between them for recognition and favor from the State.

Recent scholarship has focused much more directly than had been true for some time on the significance of the complex reality in which this model is descriptively inadequate.⁹¹ As to the law school itself, while it is again common for academic lawyers to acknowledge at a very general level the importance of materials outside of law (such as the conventions of the culture and popular moral values) in family law, there is a much more limited interest in formal pluralist inquiry, or even detailed comparative material, although some work of this type can be found.⁹²

The idea that state law is important, but not all important, is probably an idea which students bring with them to school. It comes from such things as traditional religious backgrounds in which the idea of law observance (as related to a religious system) is strong.⁹³ It may also come from an observation of the difficulties which the law has in enforcing some of its judgments in family law. Or from popular culture. Both the religious sources of family law and the interest of religious groups in reform of family law are obvious.

With formal equality, we see the wife as equal in law and may focus on such things as economic power within the family as the source of internal family power.⁹⁴ But attention should also be paid to the regulation of family life by the family's recognition of religious law, not least because it is one major source of the resistance to legally mandated change.

⁹⁰The controversy over the problem of the "get"—Jewish divorce—relates to both religious law and state law. An analysis may focus on the arguments within the religious legal system as well as the state system. *E.g.*, Institute of Jewish Law, *Forcing a Husband to Grant His Wife a Jewish Divorce by Withholding His Property*, JEWISH L. REP., Dec. 1997, at 37–52 (treating the power of non-Jewish court to compel recalcitrant husband to give get). *See also* Nadine Brozen, *Annulling a Tradition*, N.Y. TIMES, Aug. 13, 1995, at B1.

⁹¹*See* Nomi Mara Stolzenberg & David N. Myers, *Community, Constitution and Culture: The Case of the Jewish Kehilah*, 25 MICH. J.L. REFORM 633 (1992)(discussing New York Kehilah).

⁹²*See, e.g.*, MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987).

⁹³It is assumed in the American discussion of family violence that the police will be called promptly, and that the police will take the violence seriously. But even if the police are prepared to act, sub-groups may feel that they have adequate reason not to call the police.

Concerning the ancient idea that the family-household is the avenger of injuries, *see* AGATHA CHRISTIE, *MURDER ON THE ORIENT EXPRESS* 243–50 (Greenway ed. 1960) (1933).

The extended family may also operate to restrain a spouse, a husband who is, for example, accountable to a wife's family. Recently, this point was made in relation to wives in traditional Islamic societies. *See* Marlise Simons, *Cry of Muslim Women for Equal Rights Is Rising*, N.Y. TIMES, Mar. 9, 1998, at A6.

⁹⁴In America, we are unaccustomed to invoking as a model a possible alternative figure: an emotionally autonomous and independent woman who is economically dependent. Our assumption is that economic dependence results in subordination. An emphasis on independence may put pressure on some for whom dependence might be a better model. Carl Schneider discusses this issue in his book, *THE PRACTICE OF AUTONOMY: PATIENTS, DOCTORS & MEDICAL DECISIONS* (Oxford University Press 1998).

III. WHAT IS THE SUBJECT OF FAMILY LAW?

Is Susanna and the Elders a story about family law? One that takes place within family law? Surely we cannot answer this without having some sense of what family law is about, and whether it is always about the same things, occupying the same space, as it were, in law and in our heads. Today it seems that family law, so often focused on the personal affective relations of two individuals, is also the site of a large discussion about the definition of humanity itself, as the debate over cloning is (or can be) treated as an aspect of the issue of reproductive rights.

It might be said that everyone knows that family law has a history. Everyone knows that some things were once true which are no longer true. Polygamy is no longer practiced by the Jews, though it was an aspect of Jewish life as described in the Bible.⁹⁵ The right of the feudal lord to the first night with the new bride⁹⁶ is obsolete, as is, in fact, the lord himself. The power of the patriarch over the life and death of his children is not now what it was—whatever it was—at Roman law.⁹⁷ The *lettre de cachet de famille* of pre-revolutionary France is hardly recognized in what is perhaps its closest modern echo, the law of civil commitment.⁹⁸

This history was sometimes presented as constant until the very recent past. It is told as a history of women's oppression, and, in the United States, told as though nothing much happened between the period of the first and second feminist movements, that is, the period of the suffrage movement (suffrage itself seen often as linked to conservative social issues) and the period of 1960s feminism. Thus Anne Hollander has written that "[a] return to unmodern circumstances occurred in fashion and in sexual life, as if the great liberating and integrating moves of the teens, twenties and thirties had never occurred."⁹⁹ And again, "[t]he Angel in the House' was also revived, and middle-class women again wished to have five children and bake their own bread, instead of becoming brain surgeons or senators as they had thought of doing in the thirties."¹⁰⁰

The standard account is a problem not only because of its omissions, but also because it suggests something false about progress. If we include the omitted period of the New Deal, it becomes plain, as some historians have suggested, that there was a substantial backsliding after the Second World War, not an inevitable historical

⁹⁵We often associate polygamy with fundamentalist Mormons and Muslims. In the twentieth century, a version was still found in Chinese culture. See, for example, SU TONG, *RAISE THE RED LANTERN* (Michael S. Duke trans., 1993) (1990).

⁹⁶The nature and extent of this right is disputed. See Paul H. Freedman, *Droit du Seigneur*, in *MEDIEVAL FRANCE: AN ENCYCLOPEDIA* 305, 305 (William W. Kibler & Grover A. Zinn eds., 1995); G.G. Coulton, *MEDIEVAL VILLAGE, MANOR AND MONASTERY* 464–69 (Harper and Row, 1960) (1925); FRANCES ELEANOR PALERMO LITVACK, *LE DROIT DU SEIGNEUR* IN *EUROPEAN AND AMERICAN LITERATURE* 2–11 (1984). The *droit du seigneur* continues to be known through, for example, Mozart's *Marriage of Figaro*.

⁹⁷See William Harris, *The Roman Father's Power of Life and Death*, in *STUDIES IN ROMAN LAW: ESSAYS IN MEMORY OF A. ARTHUR SCHILLER* (Bagnalls & Harris eds., 1986).

⁹⁸See Carol Weisbrod, Book Review, 13 *CONN. L. REV.* 415 (1981) (reviewing JACQUES DONZELOT, *THE POLICING OF FAMILIES* (1979)).

⁹⁹ANN HOLLANDER, *SEX AND SUITS* 166 (1994).

¹⁰⁰*Id.* at 166.

continuity with the oppression of the past, but a regression after a period which looked rather different.

As our history becomes more complex, and particularly as we see that the 1950s marked a step backwards, an observation in Pollock and Maitland's *History of English Law*, to the effect that progress is not inevitable in the legal history of women, becomes more meaningful to us. We may also see the possibility that "the law when it changes does not always change in favour of the wife."¹⁰¹ The legal changes which underlie Margaret Atwood's novel, *The Handmaid's Tale*, are alarming precisely because they are possible.¹⁰² History, comparative law, and science fiction all provide alternative visions of the public order, some much less favorable to women than the one we take as the baseline.¹⁰³

The study of the history of family law, with an emphasis on American materials, was revitalized in the early 1980s, with the seminars held at the law school at the University of Wisconsin and the publication of Michael Grossberg's book on the legal history of the American family.¹⁰⁴ It is only quite recently that attention has been paid to the details of those rules in America, the changes in them and variation in them. It is by virtue of these historical studies that we understand that the legislative impulses of the Purity Crusade give a nineteenth century date to "Puritan" tendencies in our law. The particularly American emphasis on the impact of separation of church and state and of secularization means that issues of law and morals are coming once again to the center of the conversation in family law, and with it the debate over which version of morality, and which version of the family, the law should adopt. Thus, beyond the extended family we can consider the governance question. This is the "nonmarital family" or even the nonmonogamous family.¹⁰⁵

There is still much to be known. For example, while everyone would acknowledge the ancient lineage of the law of the family and while it is standard to refer to the influence of religious models on the legal rules concerning the family, only some work has been done on the actual operation of multiple systems in individual families.¹⁰⁶

Some things, however, we can see, particularly about the way the shape of the history has changed.¹⁰⁷ A large focus of the history of the law of the family was once property. This is evident in Pollock and Maitland,¹⁰⁸ and again in some of the work

¹⁰¹2 POLLOCK & MAITLAND, *supra* note 89, at 403.

¹⁰²See MARGARET ATWOOD, *THE HANDMAID'S TALE* (1986).

¹⁰³See, e.g., *id.* For another futuristic account raising feminist issues, see SHERI S. TEPPER, *GIBBON'S DECLINE AND FALL* (1986).

¹⁰⁴See MICHAEL GROSSBERG, *GOVERNING THE HEARTH* (1985).

¹⁰⁵The claims of individuals in relation to some of these interests have been raised in our generation by the arguments for homosexual marriage, sometimes an attempt to establish legal status for the sake of participation in certain decisions (e.g. medical).

¹⁰⁶For an emphasis on non-state law, see CAROL J. GREENHOUSE, *PRAYING FOR JUSTICE* (1986); JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* (1983).

¹⁰⁷However, some of what we see may be wrong. Consider, for example, the issue of the rule of thumb. See Henry Ansgar Kelly, *Rule of Thumb and the Folklaw of the Husband's Stick*, 44 J. LEGAL EDUC. 341, 341-42 (1994) (criticizing conventional understanding of the origin of the phrase "rule of thumb").

¹⁰⁸See 2 POLLOCK & MAITLAND, *supra* note 89.

of Julius Goebel.¹⁰⁹ Goebel noted that “[t]he hand of history has lain heavy upon our subject because, as Karl Marx very clearly noticed, there has always been an interdependence of family and property.”¹¹⁰ When, in 1946, Goebel included a section on family law in his materials in *The Development of Legal Institutions*, he produced a table of contents that reads, at least in the section on the common law and the family, like the outline of the first semester of a standard property course.¹¹¹

In the following decades, family law was often focused on conflict of laws, or on trusts and estates or, later on, on issues of psychology and the integration of this field with the social sciences.¹¹² Leading examples of this writing focused on the welfare of children using social science perspectives.¹¹³

As to the issue of family law and women, one might say that it has been conventional for decades that the subject is of special concern to women. But the challenge to the rules about the subject in the name of feminist and equality concerns is relatively new. Where family law once meant something about a description of the condition of women, a description written largely by men relatively satisfied with what they saw, it more and more opens questions about structural tensions between the family and the workplace which relate to men and women. Moreover, issues of property—whose is the car, money, dog, child—have raised basic questions about the meaning of property. These questions are as radical as those traditionally posed by, for example, Marxist and Utopian thinkers.¹¹⁴

¹⁰⁹ JULIUS GOEBEL JR., *CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS* 442 (1946)

¹¹⁰*Id.* Goebel also noted, as a conservative influence, the teaching of religion, which “fostered a pessimistic opinion of the capacity of women.” *Id.*

¹¹¹*See id.* at Table of Contents, Ch. III, Pt. II. Goebel referred to this as new material on family and property. Goebel’s material on the family include sections on the growth of free alienation, the conditional fee, the fee tail, etc. *See id.* at 467–80. Compare the approach of Fowler Harper’s family law casebook, which appeared only a few years later with an emphasis on social science—but not historical—material. *See FOWLER V. HARPER & JEROME SKOLNICK, PROBLEMS OF THE FAMILY* iii (rev. ed. 1962).

¹¹²*See* discussion in J. Herbie Difonzo, *Coercive Conciliation: Judge Paul W. Alexander and the Movement for Therapeutic Divorce*, 25 U. TOL. L. REV. 535, 538 (1994) (discussing the “[i]ssues of crime, social deviance and divorce” merging social science into law).

¹¹³*See* particularly JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* *passim* (1979). The discussion of the use of interdisciplinary materials in family law (or generally) now is reminiscent of an earlier discussion in which similar points were made concerning the utility of interdisciplinary material, then from the social sciences.

¹¹⁴It may be that an assumption in some of the modern discussions was that radical changes in the role of women could not really come into existence and were not needed. In 1967, David Riesman discussed issues of achievement. *See 1984 Plus 16*, TIME, July 21, 1967, at 58. “As the society becomes more fair and just, making everyone in it dependent on achieved rather than adventitious accomplishments,” says Riesman, “it becomes more precarious, less relaxed, less arbitrary and corrupt, with fewer respites from competition. . . . If anything remains more or less unchanged,” Riesman thought, it would be the role of women. *Id.* “Their standing will still depend at least as much on the men to whom they attach themselves as on their own accomplishments in meritocratic terms.” *Id.* Not even in the year 2000, according to Reisman in 1967, is that necessarily a bad thing. “It could be argued,” says Riesman, “that women buffer men against the abuses of meritocracy, bind up their wounds, and make it possible for them to go on playing a game that, if not a zero-sum game, makes even the winners often feel like losers.” *Id.* Quite obviously, as women become players, we raise the question who or what buffers the women?

Finally, we may be coming out of the time when we think that family law is about women. As women are more and more simply human beings, who make professional and life choices, the issues of the family become issues for both men and women. As nontraditional families become more and more common, and increasingly acknowledged, the law of the family becomes, once again, "about" its functions, and particularly its functions in relation to the rearing of children and the care of dependents. We see that the property emphasis, with which it was associated for such a long time, is coming once again to the forefront as issues of the economics of divorce and the economic analysis of personal relationships become more and more the style of the conversation in family law. And we see more and more emphasis on non-adversarial approaches to decision-making about the family, parallel to ideas of negotiation and compromise within the family, even after official decisions are made.¹¹⁵

IV. CONCLUSION

The title of Robert Dahl's book, *Who Governs*,¹¹⁶ seems to capture the approach of many conversations on family governance. In an approach which parallels our dominant political theory, we focus on the question who, as an individual, governs, and ask how that power to govern can be better shared with others. Often the goal is equality in the family, at least as between adults, and when we consider this, we use a model of democratic political decision making. The focus is on individuals in a nuclear family. The approach is not new. It is the stance that John Stuart Mill took when he said that it was not obvious that husband or wife should necessarily be dominant, and still less obvious that law should decide the issue.¹¹⁷ The same focus on the couple informs James Fitzjames Stephen's response to Mill, stressing the desirability of deference by the wife to the husband.¹¹⁸

Individuals, however, decide things on the basis of something, some idea, some value. Thus, we can see the family as a place in which normative orders compete through individuals. Such competition between codes, and the negotiations between individuals which result may change the question from Who governs? to the question Who decides what, when and how? We recall the joke about decisions in the family

¹¹⁵Thus, the judge in *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966), setting the course for the child's future, (*id.* at 158) was, in effect, reversed by the parties themselves. In *Painter*, a court awarded custody of a boy to his grandparents, over the arguments of a widowed father whose approach to life was apparently considered too bohemian, even though there was no finding of unfitness. After the decision, the grandparents agreed to give the child to the father. See JUDITH AREEN, *CASES AND MATERIALS ON FAMILY LAW* 1292 (3d ed. 1992). For extended consideration of the case, see CARL E. SCHNEIDER & MARGARET F. BRINIG, *AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS AND PERSPECTIVES* 620-41 (1995).

¹¹⁶ROBERT A DAHL, *WHO GOVERNS?* (1961).

¹¹⁷JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (Sue Mansfield ed., AHM 1980) (1869).

¹¹⁸See JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY AND THREE BRIEF ESSAYS* 195-98 (University of Chicago Press 1991) (1873).

to the effect that the husband decides such large questions as who will be president while the wife decides such issues as where the children will go to school.¹¹⁹

Our models of family decisions relate to several kinds of decisions and contemplate several kinds of decision making processes. Thus, we speak of decisions in the family relating to health, education, and the like, in relation to children, and allocate these to parents, or sometimes persons in the place of parents. We distinguish between power and influence when we say that, for example, someone must be notified of something before it happens. We leave room for judgment and reassessment when we ask for waiting periods before something can be done. Increasingly, we associate family decision making with life and death issues. Though the family has always had a critical role in relation to issues of life chances and opportunities—who is educated, for example, and how—it is apparent that its power in the field of medicine particularly is growing as the choices become simultaneously more complex and more visible.

At the same time, while we review discussions of decision making, it seems that our approaches to these issues in the family are thin. In some contexts, we speak as though power and particularly patriarchal power was the only relevant power, and the issue of violence against women has sometimes operated to foreclose inquiry into issues of relative power and what is now called partial or incomplete agency.¹²⁰ We often focus on the nuclear family, neglecting the significance of participants beyond this group in creating intimate contexts.

Indeed, the repeated dissolutions of the small family may have yielded a post-modern definition of extended family. For example, Delia Ephron notes that

The extended family is in our lives again. This should make all the people happy who were complaining back in the sixties and seventies that the reason family life was so hard, especially on mothers, was that the nuclear family had replaced the extended family. . . . Your basic extended family today includes your ex-husband or -wife, your ex's new mate, your new mate, possibly your new mate's ex, and any new mate that your new mate's ex has acquired. It consists entirely of people who are not related by blood, many of whom can't stand each other.¹²¹

Oscar Wilde, in *The Importance of Being Earnest*, offers a brief colloquy on family life.

¹¹⁹For some different meanings of "agency" here, see AMARTYA SEN, *INEQUALITY REEXAMINED* 57–58 (1992) (distinguishing between an agency which involves participation and an agency that does not).

¹²⁰See Kathryn Abrams, *Respecting Women's Lives and Investigating Women's Consciousness: A Comment on Obiora*, 47 Case W. Res. L. Rev. 399, 399 (1997). To the extent that the focus is now on what Kathryn Abrams has referred to as a middle ground in the conversation over agency, has the feminist conversation now moved to an area in which issues relating to women are not the only issues to be explored? See *id.* When the Nobel prize winning physicist Rabi said that if he had remained in Poland he would have been a tailor, he quite possibly meant something beyond constraints which were the results of external societal discrimination. See ALFRED KAZIN, *A LIFETIME BURNING IN EVERY MOMENT* 336 (1996).

¹²¹Judith Stacey, *Backward toward the Postmodern Family*, in *AMERICA AT CENTURY'S END* 17 (Alan Wolfe ed., 1991) (quoting DELIA EPHRON, *FUNNY SAUCE* (1986)).

Algernon (languidly): *I don't know that I am much interested in your family life, Lane.*

Lane: *No, sir; it is not a very interesting subject. I never think of it myself.*¹²²

But while Algernon's manservant never thinks of his family life, it presumably exists and he functions in it, on the basis of rules often unarticulated and unacknowledged. To the extent they are brought into the light, they may immediately be denied and may in fact then be abandoned.¹²³ It may therefore be quite difficult to think about one's own family or one's own definition of intimate life. Further, our idea that law can pass its responsibilities on to some other field may be misguided. For example, take the question "how broadly shall we define the groups around the individual who can make decisions for that individual?" We might imagine that this is easier in languages that have familiar and polite forms. But, despite the clarity of the linguistic forms themselves, using the familiar form as a test for participation in decision making, while simple in theory, is complex in fact.¹²⁴

What we know is that in the end, as is usual, law can draw on other disciplines but will finally have to "decide" itself.

From the point of view of law, the story of Susanna is a record of failure. While the story may be the model of an early detective story,¹²⁵ it is far from a model of either exemplary legal or family decision making. On the contrary, from the point of view of human institutions, it is in effect the story of a regression to theophany, and direct invention of the divine through a divinely inspired agent in the regulation of human affairs. The elderly judges are corrupt. Susanna's motivations are unclear and the outstanding attribute of most of the characters is passivity. When the story of Susanna is invoked in an active sense, as by Shakespeare,¹²⁶ it can only be Daniel who meets the test of a positive character. But the story does bring into focus overlapping sources of power relating to the family. The family is regulated by the church, by the state (through the law in all of its parts) and by the family itself through shifting coalitions of members. It seems that these members may or may not be parents and children, may or may not share a household, and may or may not use the rules of church or state as the basis of their decisions.

¹²²OSCAR WILDE, *The Importance of Being Earnest*, in THE COMPLETE WORKS OF OSCAR WILDE 321, 322 (J.B. Foreman ed., 1989).

¹²³See Walter O. Weyrauch, *Law in Isolation—the Penthouse Astronauts*, TRANS-ACTION, June 1968, at 39; GROUP DYNAMIC LAW: EXPOSITION AND PRACTICE (David A. Funk ed., 1988).

¹²⁴See, for example, the discussion in *Tu Embarrassing*, THE ECONOMIST, Oct. 4, 1997, at 58 (noting that there is considerable variation in individual use of the familiar and polite forms, depending on a wide range of factors). The complexity is suggested by two points from the piece: that Simone de Beauvoir and J.P. Sartre apparently addressed each other as *vous*.

¹²⁵See Dorothy Sayers, *Introduction* to GREAT TALES OF DETECTION vii, vii (Dorothy Sayers ed., 1991) (referring to detective stories in the Old Testament Apocryphal Books).

¹²⁶WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1.