

## Epilogue: Of Families, Federalization, and a Quest for Policy

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*Unfortunately, the American family is confronted with the problem whether it shall continue to exist, and the American people, whether they like it or not, should look the problems of their family life squarely in the face as the greatest of all their social problems.*

Charles Ellwood, 1909

At the beginning of this century, Charles Ellwood feared the demise of the family. But at century end, the family still exists (and will continue to exist), albeit in some forms not legally recognized in 1909. This century has seen two world wars, women's suffrage, a great depression, wars in Korea and Vietnam and civil rights legislation. Mass-produced automobiles, high-speed trains, and airplanes replaced trains and steamships. Telegraph and telephone communications gave way to radio, television, computers, and digital cellular phones. Incredible advances in medicine continued throughout the century from ABO blood typing in 1902 to tissue typing, DNA testing, penicillin, birth control pills, cures for small pox and polio, laser surgery and alternative reproductive techniques. The microchip, invented only thirty years ago, has permeated all aspects of our lives. Massive changes in the economy continue as we move from a manufacturing to a service economy needing a managerial, professional, technical class, not factory workers. Women, who could not vote at the beginning of the century, have entered the workforce in unprecedented numbers forcing an ongoing redefinition of gender roles.

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Yet even amid the breathtaking developments and in times of changing values, most people continue to seek a successful marriage and a satisfying family life.<sup>1</sup> The family remains the best form of human organization found to date for providing the nurture, love, emotional support, and the instruction children need to survive and to become healthy, happy citizens. Families, by providing roots, form the building blocks of society. When the blocks crumble, society crumbles. Today, these roots are being jerked out in all sorts of ways—divorce, out of wedlock births, abuse and neglect, drugs, school violence, juvenile crime, and poverty.

The turn of the century provides us with a unique opportunity to evaluate where we have been. As lawyers, we have seen expanding definitions of what constitutes a “family,” the shift from state to federal and international regulation of many family matters, and dramatic changes in the practice of law. Where we are going depends on our ability as individuals, as a profession, and as a nation to reconcile some of the conflicting ideals that exist at the end of the century.

### I. Changing Definitions of Family

During the twentieth century the concept of family as a fixed social unit with fixed membership and roles has evolved into a more functional definition. A definition of a nonfarm family in 1900 would have described an extended group of biologically related individuals living in close proximity to each other which probably included a husband who worked outside the home and a wife who cared for biological children at home. As late as the 1960s, the TV families of the Nelsons and the Cleavers exemplified a somewhat contracted nuclear family. Today, a family more likely would be defined as “a group of people who love and care for each other.”<sup>2</sup> Why has the definition changed?

1. Norval D. Glenn, *Values, Attitudes and the State of American Marriage*, in *PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA* (David Popenoe et al. eds. 1996)(citing numerous studies where college students and others rated marriage and satisfying home life high on priority list).

2. See SAM ROBERTS, *WHO WE ARE: A PORTRAIT OF AMERICA BASED ON THE LATEST U.S. CENSUS 34* (1995)(definition of family given by three-fourths of those surveyed). See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* (1985); HERBERT JACOB, *A SILENT REVOLUTION: ROUTINE POLICY MAKING AND THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 140 (4th ed. 1992)(family economically efficient because of division of labor). *But see* STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (1992).

The major reason for the redefinition is because the composition of the American family itself has changed dramatically from the beginning of the century. The staggering numbers of divorces and out of wedlock births have transformed the paradigm. In 1900, there were 200,000 divorced persons; in 1998, there were 19.4 million. Divorces quadrupled between 1960 and 1999 so that today nearly one-half of all marriages end in divorce. While in 1970 less than 11 percent of the births were to single mothers, today one in three children is born to an unwed mother. At least one-fourth of all children live in a one-parent household. Two-thirds of all children may spend some or all of their childhood in a single-parent home. Because 70 percent of divorced persons remarry, an assortment of stepparents, step-siblings, live-ins, or other persons may come and go.

Nonmarital cohabitation has increased from 475,000 in 1960 to over 4 million in 1998 as more couples choose to live together without formalities. More same sex couples live together; some have children. There has been a marked increase in single person households due to individuals living longer, deferring marriage (the average age for men to marry is now over twenty-six and over twenty-four for women) and never marrying or not remarrying. Many who marry choose not to have children—the DINKS (dual income, no kids). For couples who do have children, the number has declined from seven in 1900 to two or less today.

Many of the family functions—economic security for a dependent, child care, education, job training, food—can be satisfied by a person who is not a legal spouse or a legal or biological parent. Tax laws, zoning laws, federally subsidized housing, rent control, and social welfare programs use different definitions of family. What constitutes a family today may depend upon the context in which the question arises.<sup>3</sup>

Therefore, families at the end of this century do not look like they did at the beginning. Only 26 percent of American families today meet

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3. See generally HARRY D. KRAUSE, LINDA D. ELROD, MARSHA GARRISON & THOMAS OLDHAM, *FAMILY LAW* ch. 1 (4th ed. 1998), citing *Moore v. City of East Cleveland*, 431 U.S. 494 (1977)(grandchildren for zoning); *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49 (N.Y. 1989)(gay partner for rent controlled housing); *Hann v. Housing Authority of Easton*, 709 F. Supp. 605 (E.D. Pa. 1989) (unmarried couple with children for low-income housing); *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973) (commune for food stamps). *But see* *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)(college students not a family for zoning); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977)(foster family not entitled to same protections as legal family).

the model of one wage earner, stay-at-home wife, and two children.<sup>4</sup> Single-parent and two-working-parent families constitute the majority. Families may consist of children and stepparents, foster parents, lesbian or heterosexual partners, grandparents, or siblings.

When considering what rights or obligations, if any, these persons should have to get benefits from each other or to maintain relationships, it is important to note that there is a disconnect between the real world and what politicians think families are. Policies made for the traditional family often have unintended, sometimes negative, consequences on the nontraditional families that are rapidly becoming the "norm." The rapid pace of changes in family structure, function, and gender roles has moved faster than our ability to adapt our thinking, let alone our laws and institutions. Judges, lawyers, and legislators are struggling to define the family in ways that make sense for the parties, for children, and for society.

## **II. Nationalization (and Internationalization) of Family Law**

At the same time that there have been revolutionary changes in the structure of the family, the United States has tried to end discrimination based on race, sex, age, handicap, religion, and nationality; provide welfare for needy citizens; and keep the economy healthy. In addition, there have been unfathomable improvements in information systems, an enhanced ability to travel both within the United States and abroad, and the opening of a truly global market. The result has been federal legislation, Supreme Court decisions, and international treaties which have federalized and internationalized many areas of family law.<sup>5</sup>

### *A. Federal Legislation*

Traditionally, states regulated family law under the Tenth Amendment because the federal government did not. One hundred years ago, the U.S. Supreme Court reiterated that "[t]he whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of

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4. See The Emerging 21st Century American Family, <http://www-news.uchicago.edu/releases/99/991124.family.shtml>.

5. See Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1995); Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073 (1994); Jill Elain Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. Rev. 1297 (1998).

the State, and not the laws of the United States.”<sup>6</sup> By the end of the century, however, Congress had enacted numerous federal statutes to address serious problems that states were either unwilling or unable to resolve. During the last thirty years, federal legislation has affected nearly every area of family law: establishing and enforcing child support;<sup>7</sup> child custody jurisdiction;<sup>8</sup> abortion, childbirth, and family planning;<sup>9</sup> foster care and adoption;<sup>10</sup> bankruptcy;<sup>11</sup> health insurance for dependents;<sup>12</sup> pensions;<sup>13</sup> recognition of marriages;<sup>14</sup>

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6. *Simms v. Simms*, 175 U.S. 162, 167 (1899). See also *In re Burrus*, 136 U.S. 586 (1890)(no federal jurisdiction to issue a writ of habeas corpus in custody dispute); *Barber v. Barber*, 62 U.S. (21 How.) 582 (1858).

7. See Child Support Enforcement Amendments of 1984, Pub. L. No. 98–378, 98 Stat. 1305 (1984)(codified as amended in scattered sections of 42 U.S.C.); Family Support Act of 1988, Pub. L. No. 100–485, 102 Stat. 2343 (1988)(codified at 42 U.S.C. §§ 654, 666–667); Child Support Recovery Act of 1992, Pub. L. No. 102–521, 106 Stat. 3403 (1992) (codified at 18 U.S.C. § 228); Personal Responsibility Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104–193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.); Full Faith and Credit for Child Support Orders Act of 1994, Pub. L. No. 103–383, 108 Stat. 4064 (1994)(codified at 28 U.S.C. § 1738B (1997)); Deadbeat Parents Punishment Act of 1998 (DPPA), Pub. L. No. 105–187, 112 Stat. 618 (1998).

8. Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96–611, 94 Stat. 3569 (1980)(codified at 28 U.S.C. § 1738A); International Child Abduction Remedies Act, 42 U.S.C. § 11601 *et seq.*; International Parental Kidnapping Act (IPKA), 18 U.S.C. § 1204 (1994).

9. See, e.g., Family and Medical Leave Act of 1993, Pub. L. No. 103–3, 107 Stat. 6 (1993); Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103–259, 108 Stat. 694 (1994)(codified at 18 U.S.C. § 248); Newborns’ and Mothers’ Health Protection Act of 1996, Pub. L. No. 104–204, tit. VI, 110 Stat. 2935, 2936 (1996).

10. Child Abuse Prevention and Treatment and Adoption Reform Opportunities Act of 1978, Pub. L. No. 95–266 (codified at 42 U.S.C. §§ 701–709); Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96–272, tit. I, 94 Stat. 500 (1980)(codified as amended at 42 U.S.C. § 670 *et seq.*); MultiEthnic Placement Act, Pub. L. No. 103–382, 108 Stat. 4056 (1994)(codified at 42 U.S.C. § 5115(a)); Small Business Job Protection Act of 1996, Pub. L. No. 104–188, § 1808, 110 Stat. 1755, 1903 (repealing § 553 of the Howard Metzenbaum MultiEthnic Placement Act of 1994); Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (1997)(codified at 42 U.S.C. §§ 5101–07); see also Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 102–586, 106 Stat. 4981 (1992)(codified at 18 U.S.C. § 5031 *et seq.*); Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*; Indian Child Protection and Family Violence Act, 25 U.S.C. § 3201 *et seq.*

11. Bankruptcy Reform Act, 11 U.S.C. § 101–1330 (1994), as amended. See Margaret Howard, *A Bankruptcy Primer for the Family Lawyer*, 31 FAM. L. Q. 377 (1997).

12. Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), 29 U.S.C. §§ 1161 *et seq.*; Qualified Medical Child Support Orders, 29 U.S.C. § 1169; Health Insurance Portability and Accountability Act of 1996.

13. Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*; Retirement Equity Act of 1984, 29 U.S.C. § 1056 (ERISA preemption does not apply if state court issues Qualified Domestic Relations Order). See also Uniformed Services Former Spouses’ Protection Act (USFSPA), 10 U.S.C. § 1401.

14. Defense of Marriage Act, Pub. L. No. 104–199, 110 Stat. 2419 (1996).

family violence;<sup>15</sup> tax;<sup>16</sup> family leave policies;<sup>17</sup> and parental rights.

Most federal legislation has been like a patchwork quilt to cover perceived holes in the existing system or to attack a particular problem. Congress has utilized its spending power to set policy and provide funding for favored programs and has used its powers under the Commerce Clause and the Full Faith and Credit Clause when there have been conflicts between state laws. The area of child support demonstrates how Congress has set the national social welfare agenda by passing laws, allocating money for programs that require states to comply with federal regulations to receive funding. The 1935 Social Security Act established Aid to Families with Dependent Children (AFDC) to support children whose fathers had died. It quickly became welfare for single mothers with children whose fathers were absent from the home and not paying support. In 1974, Congress required all states receiving AFDC funds to set up a child support enforcement agency called the "IV-D" agency. Because the state's rely on federal monies to operate the AFDC system, the federal government has been able to dictate standards for establishing and enforcing child support to shift the financial burden to the fathers.<sup>18</sup> Federal courts have upheld laws conditioning federal funding upon a state's enactment of laws or regulations, so long as it is in pursuit of the general welfare.<sup>19</sup> Federal courts also have upheld the constitutionality of criminal enforcement laws such as the Child Support Recovery Act of 1992.<sup>20</sup> In 1996 child

15. Domestic Violence and Stalking, 18 U.S.C. § 2261 (1996)(criminal statute); Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1902 (1994)(codified at 42 U.S.C. § 13981)(civil right to be free of gender crimes); Victims of Child Abuse Act of 1990, Pub. L. No. 101-647, tit. II, 104 Stat. 4792 (1990); Family Violence Prevention and Services Act, Pub. L. No. 98-457, tit. III, 98 Stat. 1757 (1984). *But see* Brzonkala v. Virginia Polytechnic Institute, 169 F.3d 820 (4th Cir. 1999), *cert granted* (challenge to VAWA civil remedy).

16. Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984); Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986); Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 (1997).

17. Family and Medical Leave Act, 29 U.S.C. § 2601. Thirty-four states had family leave acts. The federal act only preempts those that are less generous than the federal law. 29 U.S.C. § 2651(b).

18. *See* Linda Henry Elrod, *The Federalization of Child Support Guidelines*, 6 J. ACAD. MATRIM. LAWYERS 103 (1990); Linda D. Elrod, *Child Support Reassessed: Federalization of Enforcement Nears Completion*, 1997 ILL. L. REV. 695; Ann Laquer Estin, *Federalization and Child Support*, 5 VA. J. SOCIAL POL'Y & THE LAW 541 (1998). *See also* HARRY D. KRAUSE, *CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVES* (1981).

19. *See* Children's & Parents Rights Ass'n. of Ohio v. Sullivan, 787 F. Supp. 724 (N.D. Ohio 1991); *Kansas v. United States*, 24 F. Supp. 2d 1192, 1197 (D. Kan. 1998)(finding that the challenged provisions were intended to serve the general welfare as "The overall goal of PRWORA was to protect children and facilitate the self-sufficiency of welfare recipients.")

20. *See* United States v. Black, 125 F.3d 454 (7th Cir. 1997); *United States v.*

support provisions were combined with welfare reforms that eliminated AFDC, replacing it with Temporary Assistance to Needy Families (TANF). The net effect of the patchwork policy may be that children receive all the support obtainable from an absent parent and still be poor because the government safety net is gone.<sup>21</sup>

*B. The Supreme Court and the  
Constitutionalization of Family Law*

Until recently family law has consisted mainly of state statutes interpreted by state trial judges who exercised a great deal of discretion. Federal courts have long used the “domestic relations exception” to avoid judicial involvement in substantive domestic relations matters.<sup>22</sup> Even when a federal statute is involved, the Supreme Court has found that federal laws concerning federal benefits preempt only when state laws cause major damage to a clear and substantial federal interest.<sup>23</sup> During the first half of this century, the main family law area in which the Supreme Court exerted any significant presence was in the area of full faith and credit for varying aspects of migratory divorces.<sup>24</sup> The Supreme Court also recognized a “private realm” of family life—the freedom of personal choice in matters of marriage and procreation as one of the liberties protected by the Due Process Clause of the Fourteenth Amendment,<sup>25</sup> but it has only been in the last twenty-one years

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Williams, 121 F.3d 615 (11th Cir. 1997); *United States v. Crawford*, 115 F.3d 1397 (8th Cir. 1997); *United States v. Bailey*, 115 F.3d 1222 (5th Cir. 1997); *United States v. Johnson*, 114 F.3d 476 (4th Cir. 1996); *United States v. Parker*, 108 F.3d 28 (3d Cir. 1997); *United States v. Bongiorno*, 106 F.3d 1027 (1st Cir. 1997); *United States v. Hampshire*, 95 F.3d 999 (10th Cir. 1996); *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996); *United States v. Wall*, 92 F.3d 1444 (6th Cir. 1997); *United States v. Sage*, 92 F.3d 101 (2d Cir. 1996).

21. See Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L. Q. 1 (1990); Linda D. Elrod, *Child Support Reassessed*, *supra* note 18, at 709.

22. See *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890); *Ankenbrandt v. Richards*, 504 U.S. 689 (1992)(family law comprises marriage, divorce, alimony, and child custody).

23. See *Kelly v. Crosfield Catalysts*, 135 F.3d 1202 (7th Cir. 1998)(claim under Family and Medical Leave Act); *Mansell v. Mansell*, 490 U.S. 210, 229 (1989); *McCarty v. McCarty*, 453 U.S. 210, 229 (1981); *Boggs v. Boggs*, 520 U.S. 833, 841 (1997). See *Thompson v. Thompson*, 484 U.S. 174 (1988) (Parental Kidnapping Prevention Act did not create a private right of action in federal court).

24. See *Haddock v. Haddock*, 201 U.S. 562 (1906); *Williams v. North Carolina*, 317 U.S. 287 (1942); *Williams v. North Carolina*, 325 U.S. 226 (1945); *Sherrer v. Sherrer*, 334 U.S. 343 (1948); *Estin v. Estin*, 334 U.S. 541 (1948); *Johnson v. Muelberger*, 340 U.S. 581 (1951); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *May v. Anderson*, 345 U.S. 528 (1953); *Sosna v. Iowa*, 419 U.S. 774 (1975); *Kulko v. Superior Court*, 436 U.S. 84 (1978).

25. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Skinner v. Oklahoma*, 316 U.S. 535 (1942). See also *Cleveland Bd. of Education v. LaFleur*, 414 U.S. 632 (1974). See EVA R. RUBIN, *THE SUPREME COURT AND THE AMERICAN FAMILY: IDEOLOGY AND ISSUES* (1986).

that the right to marry has been classified as sufficiently “fundamental” to invoke strict scrutiny.<sup>26</sup> Even though parents have a liberty and privacy interest in the care and rearing of their children,<sup>27</sup> family autonomy is not absolute.<sup>28</sup>

Beginning in the 1960s, the U.S. Supreme Court began using the Constitution to strike down a number of state statutes regulating families based on protections of individual rights. For example, the Supreme Court has granted child custody rights to unwed fathers<sup>29</sup> and removed most of the legal discriminations based on illegitimacy.<sup>30</sup> The Court has recognized a right to marital privacy and individual privacy in contraception<sup>31</sup> and procreation<sup>32</sup> and removed restrictions on marital testimonial privilege.<sup>33</sup> It has stricken regulations that discriminated on the basis of gender<sup>34</sup> and race.<sup>35</sup> It has afforded children in delin-

26. *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987).

27. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Parham v. J.R.*, 442 U.S. 584 (1979); *Armstrong v. Manzo*, 380 U.S. 545 (1965). *See also Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Dep't Social Servs of Durham County*, 452 U.S. 18 (1981); *Little v. Streater*, 452 U.S. 1 (1981); *M.L.B. v. S.J.L.*, 519 U.S. 102 (1998).

28. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944)(state can limit parental freedom for child's welfare); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)(compulsory vaccination); *Buck v. Bell*, 274 U.S. 200 (1927)(sterilization).

29. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110, *reh'g denied*, 492 U.S. 937 (1989).

30. Between 1968 and 1983, the Court decided 20 cases on state distinctions based on illegitimacy. *See, e.g., Levy v. Louisiana*, 391 U.S. 68 (1968) (wrongful death); *Gomez v. Perez*, 409 U.S. 535 (1973) (child support); *Trimble v. Gordon*, 430 U.S. 762(1977) (inheritance); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Labine v. Vincent*, 401 U.S. 532 (1971); *Lalli v. Lalli*, 439 U.S. 259 (1978); *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Pickett v. Brown*, 462 U.S. 1 (1983); *Clark v. Jeter*, 486 U.S. 456 (1988).

31. *See Griswold v. Connecticut*, 381 U.S. 479 (1965) (marital privacy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977). *But see Bowers v. Hardwick*, 478 U.S. 186 (1986). *See also Janet D. Dolgin, The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L. REV. 1519 (1994).

32. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

33. *Trammel v. United States*, 445 U.S. 40 (1980).

34. *See, e.g., Reed v. Reed*, 404 U.S. 71 (1971); *Craig v. Boren*, 429 U.S. 190 (1976); *Orr v. Orr*, 440 U.S. 268(1979)(alimony); *Newport News Shipbuilding & Dry Dock v. EEOC*, 103 S. Ct. 2620 (1983); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Califano v. Webster*, 430 U.S. 313 (1977); *Califano v. Westcott*, 443 U.S. 76 (1979); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *United States v. Virginia*, 518 U.S. 515 (1996).

35. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

quency proceedings some of the same rights as adults.<sup>36</sup> But the Supreme Court has refused to find that there is an affirmative right to government aid in the family context.<sup>37</sup>

There is no indication that the Supreme Court will retreat from using the Constitution to examine state statutes. For example, as the year 2000 begins, the Court has agreed to revisit the issue of parental rights and family autonomy by reviewing a Washington State case involving a statute allowing grandparental visitation when the trial court concludes it is in the child's best interest.

### *C. Internationalization*

International cases in family law usually arise when a person either attempts to enforce a court order from a foreign tribunal in the United States or a person initiates a case in a foreign jurisdiction. The combination of wars (and military bases) in foreign countries, heavy immigration, foreign study abroad, and cheaper and safer air transportation has resulted in more cross cultural marriages. If such persons divorce, one person may return to the country of origin, with or without children, and seek assistance from the foreign court. The laws of more than one country may govern the dispute. The two major sources of international family "law" have developed from United Nations and Hague Conventions.

The United Nations (UN), formed in 1945 as the first democratic world body, has drafted the UN Convention on Recovery of Maintenance Abroad, the Convention on the Elimination of All Forms of Discrimination Against Women, and the UN Convention on the Rights of the Child. The latter Convention recognizes the rights of a child for continuity of relationships and for protection in the formation and preservation of their identity, including nationality, name, and family relations. Because 191 countries have ratified it (but not the United States), it may become customary international law.

The Hague Conference on Private International Law started working on problems facing family law cases that crossed country boundaries at the end of the last century. The United States, however, only began active participation in drafting these Conventions in the last twenty

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36. See *Kent v. U.S.*, 383 U.S. 541 (1966); *In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *Breed v. Jones*, 421 U.S. 519 (1975).

37. See, e.g., *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989); *Harris v. McRae*, 448 U.S. 297 (1980); *Lindsey v. Normet*, 405 U.S. 56 (1972). See also *Suter v. Artist M.*, 503 U.S. 347 (1992).

years. One of the most successful and widely adopted (fifty-six countries) has been the 1980 Hague Convention on the Civil Aspects of International Child Abduction. Spurred by increasing numbers of international child abductions, the United States ratified it effective July 1, 1988. Three other Hague Conventions await U.S. ratification—the 1993 Convention on Intercountry Adoptions, the 1996 Convention on the Protection of Children, and the 1999 Convention on the Protection of Adults.

The import for the future is enormous. At one time a local judge in a small county in the middle of the nation knew everyone in town. Today, the dispute may be between a French national and a local and involve offshore financial accounts, custody decisions from other countries, or property located throughout the world. With the increasing “globalization,” international treaties and laws will become even more important and take supremacy under Article VI of the Constitution.

### **III. The Practice of Family Law**

Tsunamis have hit the practice of law since 1900 with much of the impact being felt in the area of family law. The sheer volume of lawyers is a major change. The number has quadrupled since 1972; the profession is no longer predominantly white male as women and minorities have entered the profession in record numbers. Lawyers advertise in print, on television, and on the worldwide web. Law schools teach skills courses, alternative dispute resolution, and have clinical education components. Lawyers must take continuing legal education courses—often mandatorily—and in many states may obtain board certification in a number of specialty areas, including family law.

Computerization has taken over almost all law practices. For most of this century, person to person contact, letters, or the telephone were the primary means of client contact. Today’s lawyers worry about encryption of e-mail messages and how to update and store webpages. Digitization is replacing print. In the first part of the century, legal research might require perusing the state statute books (one or two volumes), reading the state supreme court reports, and possibly reviewing a treatise on the common law. Today, state statutes comprise numerous volumes and case law has exploded. Westlaw and Lexis bring the world (or thousands of cases anyway) to the lawyer’s office in seconds. There is so much information available at the click of a “mouse” (invented in 1970) that lawyers need ways to sort and prioritize the avalanche of information.

The practice of family law becomes more challenging annually. Family law used to be synonymous with divorce, with the major issue being to prove fault grounds (pre-1970, of course). The goal of no fault divorce was to civilize the process by keeping the dirty laundry out of the courtroom. Some predicted that no fault divorce would eliminate the need for most marital dissolutions to go to court. The opposite has happened. Parties may no longer fight over the grounds for divorce, but divorce has escalated to battles over property, support, and, most importantly, child custody.

Marital dissolution has actually become much more complex as both federal and state statutes add new definitions of "property." Pensions, stock options, and the good will of professional practices were not considered in most divorces prior to 1980. Terms like QDRO, COBRA, QMCSO, unknown twenty years ago, now fall from the family lawyer's tongue. As divorce became more prevalent, so did premarital contracting to avoid judicial discretion if divorce occurred. As domestic violence issues came to the forefront and intrafamily immunity faded, family law added more tort litigation. Today family law requires knowledge of not just "divorce law" but also civil procedure, contracts, conflicts, corporation and partnership law, evidence, criminal law, debtor-creditor, real and personal property law, trusts and estates, tax law, elder law, civil procedure, constitutional law, international law, pensions, remedies, tax, and torts.

Lawyers who once only needed to know "the law" now also need to at least understand the language of other professions. There has been an increasing interdisciplinary approach to family law. Family lawyers need to understand a spreadsheet, a pension valuation, a medical diagnosis contained in the DSM-IV, as well as the proper administration and interpretation of psychological testing.

In addition to federalization and constitutionalization, the adoption of uniform laws has led to more of a nationalization of family law. The National Conference of Commissioners on Uniform State Laws promulgate uniform acts. The Uniform Child Custody Jurisdiction Act was enacted in all fifty states and is now being replaced with the Uniform Child Custody Jurisdiction and Enforcement Act. Other uniform acts, such as the Uniform Marriage and Divorce Act, Uniform Parentage Act, Uniform Adoption Act, and Uniform Premarital Agreement Act have had more limited adoptions but have served as models for legislation in several states. When all fifty states adopt a uniform act, as has now happened with the Uniform Interstate Family Support Act, how Alaska decides an issue may be relevant in Kansas or Florida. While

sister state law is not precedent, it certainly can be persuasive. The plethora of laws granting new rights and adding new regulations has resulted in lawyers following the lead of the medical profession—specialization. Over 15,000 lawyers indicate they specialize in family law; in 1980 there were only 700. Many more lawyers practice some family law. At least 4,000 attorneys specialize in divorce mediation. The nationalization and internationalization of family law has made membership in national bar association activities important to the local lawyer who may have a client move to or from another state or country. The ABA Family Law Section had its fortieth anniversary in 1999; nearly every state bar association has added a family law section within the past thirty years. New York and the Academy of Matrimonial Lawyers have promulgated ethical codes that apply only to family lawyers. Clients who expect more expertise, however, are more willing to sue for malpractice or file an ethical grievance. The need for better communications between lawyers and clients has led to written fee agreements and to the development of client handouts. Some family lawyers have in-office seminars on various aspects of the divorce process.

Learning more laws and obtaining more expertise to provide more services have increased the costs of legal services and marriage dissolution. The cost and lack of availability of legal services has led to larger numbers of litigants appearing *pro se*, which imposes additional burdens on the judicial system. In only 41 percent of cases are both parties represented by attorneys. There are never enough *pro bono* lawyers, even with support from the poorly funded Legal Aid and legal services programs. *Pro se* litigants do not know their rights, the rules, how to fill out the paperwork, or how to make motions. Such cases may take twenty times the judicial time than if lawyers were representing the parties.

The current court system in most states is not prepared to deal with the staggering caseloads and the myriad of complex family problems that come before it. Courts dealing with family law issues have the greatest burdens and the fewest resources. The civil domestic docket is the fastest growing docket in most states, increasing 70 percent between 1984 and 1995. Child custody disputes rose 43 percent in the same time period. Over 3 million children were reported as abused or neglected to child protective services in 1995, triple the number from the 1970s. The alarming number of reports of abused and neglected children and the number of juveniles arrested for crimes strain the system. Family courts were viewed as an option in the beginning of the century. Yet today in most states, separate courts deal with children in need of care,

adoption, mental illness, guardianships, juvenile delinquents, divorce, and abuse. The same family may appear in more than one court within a relatively short period of time. There are more high conflict families with more a diverse assortments of problems, including domestic violence, substance abuse, pathological personalities. Often parents have a combination of poverty, social isolation, stress and lack of parenting skills. In spite of a century of talk about family courts or special courts for children, movement seems to be going backwards, at least in the juvenile area, by steadily reducing the age at which a child can be tried as an adult. We have abolished corporal punishment in schools and replaced it with armed security guards and metal detectors.

The last thirty years have seen a changing perception of the proper role of a lawyer from a hired gun or bomber to more of technician-negotiator-planner role. Lawyers are either learning mediation skills or learning how to counsel clients who are in mediation or arbitration. Private and court-sponsored alternative dispute resolution have developed in response to the failure of the adversarial system to adequately address complex problems of families, staggering caseloads, shrinking public resources and consumer demand for access and flexibility. While these dispute resolution alternatives are reducing some of the burdens on the system (and the parties), there is a potential for a two-tiered system of justice. Those who have money can afford either to go to court, hire a private arbitrator (a retired judge), or a mediator of their choice. Those without money must use the already overburdened court-annexed systems. For example, one-half of mothers using public mediation in one area were unemployed or earned wages below poverty level.

The challenges next century will be the delivery of legal services to those in need, adapting law practices to the new technology, harnessing the information explosion, and becoming comfortable with collaborative divorce and the increasing multidisciplinary approach to family law.

#### **IV. Challenge for the Next Century: Resolve the Conflicting Messages**

The population of the United States is aging as the babyboomers near their sixties and the younger generation has fewer children. This will ultimately translate into more people over age sixty-five who are retired rather than working; fewer persons with children in schools, which may negatively impact school bond elections; and there will be

a need for more elder care facilities. The future will look like more of a mosaic as White Americans decline in absolute numbers and Hispanic, Black, and Asian populations increase. The economic system now demands highly skilled workers in an information age. The United States appears to be emerging as a two-tiered system with close to 20 percent of the population being rich and well-educated, but with a larger proportion (perhaps up to 50 percent) of working poor or potentially unemployed. At the end of the century the country is left with numerous conflicting values and unresolved issues that will need to be addressed.

*A. Tension Between a Society Which Pays Lip  
Service to the Importance of Families But Assesses  
a Person's Worth by Economic Success*

Almost twenty years ago, Mary Ann Glendon in *The New Family and the New Property* noted that employment relationships were replacing family relationships in importance. Studies have shown that many people spend an average of twelve hours a day on the job. What does this say as to the importance of the job versus the importance of family? Look at what we value in society in terms of dollar rewards. Who makes more—a professional athlete or a teacher? a pediatrician or a surgeon? a child care worker or an engineer? a family lawyer or a corporate lawyer? Those who deal with families are often at the bottom of the financial rewards list.

Inflation in the latter half of this century made two-income families a necessity as the cost of the basic American middle class package (home, car, food, health insurance, and education) skyrocketed. House prices quadrupled; car prices tripled; college tuition quadrupled (at least); and health insurance premiums in the 1990s cost more than a house payment in the 1970s. Twenty-five years ago a wage earner could support a family of four above the poverty line on minimum wage. No longer. The minimum wage, when adjusted for inflation, was 19 percent lower in 1998 than in 1979. Thus, a single-parent today with two children does not earn enough to stay at the poverty line. Those who earn minimum wage cannot afford health care coverage. In 1999 an estimated 44 million Americans, including approximately 11 million children, had no health insurance coverage.

Working wives and mothers have increased from 5 percent in 1890, to 19 percent in 1960, to 65 percent in 1998. Seventy-five percent of all divorced women work. Half of mothers with children under three work outside the home. Young mothers experience more stressors than any other segment of the population. The average family has a child

care crisis every few months. In single-parent and two working parent households, who is watching the children? Far too often the answer is no one. Many children go home to an empty house and are alone from one to four hours. These “latch key” children play computer games, watch television, or join gangs to occupy their free time. Lack of parental supervision has been consistently related to delinquency as most teenage pregnancies and juvenile crimes occur between 2 and 6 p.m.

The frantic pace of life places incredible stress on families. Lack of money is a constant problem. In two-parent families, both parents are tired when they get home from a day at work but women still do the majority of the housework and child care.<sup>38</sup> In single-parent households, the stress is magnified. Ellen Goodman succinctly stated part of the problem, “Until the past 30 years, the ‘system’ depended on the unseen, unpaid labor of women. It was supported by a family wage and an ideology. Now women are in the workplace and we haven’t figured out a replacement.”<sup>39</sup> A panelist on a news show in the fall of 1999 despaired that she and her husband both wanted an old fashioned “wife.” Thirty years ago, in *Future Shock*, Alvin Toffler noted that, “The family has been called the ‘giant shock absorber’ of society—the place to which the bruised and battered individual returns after doing battle with the world, the one stable point in an increasingly flux-filled environment.” We cling to this image that home is the refuge from the worries of the world, an island of tranquility where Mom will give us freshly baked cookies and milk, but many homes more closely resemble the Bermuda triangle. Former Colorado Representative Patricia Schroeder accurately observed: “I think the average American family feels like a little hamster in a wheel. You run and you run and at the end of the year you are still in the box on the wheel and your tongue is hanging out.”

At the same time that stressors are increasing, the family has lost much of its social support network as it has become isolated from extended family and old friends. National and international corporations often require geographical mobility to advance. The average family moves every four years. People may live and shop in cities miles (and hours) away from where they work as the GI Bill, Levittown, and the Federal Highway Act of 1956 (creating 42,400 miles of expressway) made “commuting” workers from single family homes in the suburbs the norm. We have become, as was predicted, a “nation of strangers.”

38. ARLIE HOCHSCHILD, *THE SECOND SHIFT* viii-xi, 8–10 (1989).

39. Ellen Goodman, *System Collapsing Because Congress Won't Recognize It*, *TOPEKA CAPITAL J.* Nov. 17, 1999, at 2.

Family and friends are strewn geographically across the nation. Children have little time to form lasting attachments as they experience several neighborhoods and schools during childhood. Many feel rootless. Cellular phones and e-mail may allow families to stay in contact, but modern technology cannot substitute for person-to-person conversation with a friend or for a relative being there for an emergency.

At the same time that expenses are increasing, government support for families has declined in terms of housing subsidies and cash assistance.<sup>40</sup> Welfare reforms provide single parents with less money for a limited time (five years). Those parents with the lowest incomes are getting poorer and the rich are in fact richer. The CEO who “earned” 41 times the average worker in 1960, made 185 times in 1995, and 419 times in 1999. The divergence between rich and poor is the largest since 1926.

Congress passes a “piece” of legislation every few years to address a perceived need but has no comprehensive vision. Most other western nations provide family allowances for children in single-parent or two-parent households irrespective of need and subsidize day care, health care, and higher education for children who pass the entrance exam. Most Western European nations give everyone (workers and students) five weeks of vacation a year at the same time! The United States does less than almost any other industrialized nation for families. We also have the worst statistics on a problems with families—the highest divorce rates, highest incidence of drug and alcohol abuse, adolescent pregnancy, juvenile crime, and adolescent suicide. There may be some correlation. While more government may not be better, a dialogue does need to begin about our vision for families. The patchwork approach is not working.

### *B. Conflict Between the Dream and Reality of Marriage in a Disposable Society*

The perception of the purpose of marriage, once an arrangement for economic security and procreation, has changed. As recently as the 1950s marriage was one of the few career options open to women. Happiness in marriage then was not seen as a goal, but as a by-product. Family members were expected to make sacrifices for each other. The

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40. See DONNA L. FRANKLIN, *ENSURING INEQUALITY: THE STRUCTURAL TRANSFORMATION OF THE AFRICAN AMERICAN FAMILY* 195 (1997) (real value of welfare benefits for a family of four with no other income fell from \$10,133 in 1972 to \$7,657 in 1992). See also SYLVIA ANN HEWLETT & CORNEL WEST, *THE WAR AGAINST PARENTS, WHAT WE CAN DO FOR BELEAGUERED MOMS AND DADS* (1998).

last half of this century has seen marked changes. After one hundred years of protective labor legislation that effectively kept married women out of the workplace, Congress added Title VII to the Civil Rights Act of 1964 prohibiting discrimination on the basis of sex.<sup>41</sup> Women who entered the workforce initially because of real or perceived economic necessity have stayed because of individual fulfillment.

Today, spouses choose each other and choose to be married. A magazine article proclaims that brides are back to “romantic” marriages. The Cinderella complex perpetuates the myth of finding the perfect mate for a lifetime—but a lifetime is twice as long as at the beginning of the century. The romanticization of marriage leads to rising expectations of happiness in marriage. If a person is not “happy,” a spouse may seek a divorce and find a new partner or a new lifestyle. But “happily ever after” does not come without hard work and good communication skills, compromise, and compassion.

Our society is geared toward throwing away things that are not working rather than repairing them. It may be easier to find a new spouse than work on achieving intimacy within an existing relationship. There is a disconnect between marriage vows that say “until death do us part” and a legal system that allows unilateral divorce when one party decides it is time to move on. There is no longer a cultural consensus of marriage until death. In cases of domestic violence, there probably shouldn’t be.

The disposable mentality too often has resulted in no continued economic responsibility for children or a former spouse. That is why Congress felt the need to enact child support legislation and why there are current discussions about the need for alimony guidelines. One does not have to look far to see that women and children have suffered under the current system. A minister who runs a homeless shelter in Topeka, Kansas, indicated that the persons seeking assistance formerly were middle-aged men with addictions. During the last few years, however, women and children comprised the majority of those needing shelter, food, and support. As Professor Harry Krause says, “Easy come, easy go marriage and casual cohabitation and procreation are on a collision course with the economic and social needs of children.”<sup>42</sup>

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41. 42 U.S.C. § 2000e *et seq.* The Equal Pay Act of 1963, the Equal Credit Opportunity Act, and The Pregnancy Discrimination Act of 1978 further eliminated workplace obstacles for women. See ANDREW CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE* 56 (rev. ed. 1992) (increased labor force participation of young married women as main factor contributing to divorce after 1960).

42. Krause, *supra* note 21, at 16.

The disposable mentality means that no one is really “off the marriage market.” People continually look at others as potential partners. With such instability in modern marriage, women may choose careers simply because the potential economic risks of choosing home and family are too great. Indeed, this may be why the marriage rates hit new lows in the 1990s. The disposable mentality does have larger consequences for society.

Divorce is never merely an individual lifestyle choice without larger consequences for society. Divorce has contributed to welfare dependence and given rise to an entire public bureaucracy devoted to managing and regulating the parental tasks and obligations of raising children. It has imposed a new set of burdens and responsibilities on schools, contributed to the tide of fatherless juveniles filling the courts and jails, and increased the risks of unwed parenthood.<sup>43</sup>

As individuals and as a society, we need to reexamine the institution of marriage and find ways to support families, whether in or outside of marriage. Education about relationships, expectations, and effective communication seems essential. The ABA Family Law Section Partners Program is one attempt to bring lawyers into high school classrooms to educate about marriage and divorce. The last decade has seen a number of premarital classes sponsored by varying churches or private groups that attempt to give the prospective bride and groom some reality grounding. That’s a start.

### *C. The Tension Between the Needs of Children and the Rights of the Individual*

Children need much the same as they have always needed—someone to care for them in infancy, to feed and house them, to give them guidance and support as they grow. A parent’s pursuit of his or her own goals and happiness may conflict with a child’s need for stability and security. As one author stated: “. . . kids have suffered from the me-first, winner-take-all individualism of contemporary culture and that many parents, married or not, are having trouble meeting (or even identifying) their obligations to kids.”<sup>44</sup>

Vince Lombardi said winning is the only thing. Although might may make right in athletic contests or not taking “no” for an answer may

43. BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* (1997). *See also* MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE* (1996) (postmarital culture is responsible for crime, poverty, welfare dependence, homelessness, educational stagnation, and child abuse).

44. STEPHANIE COONTZ, *THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA’S CHANGING FAMILIES* 7 (1997).

serve in business settings, neither works well for resolving human relationship conflicts or determining the future of children. Child custody cases are not like the traditionally adversarial tort actions where one is trying to ascertain what happened at some time in the past. Instead, the custody decision involves an attempt to predict the future—with which parent will this child have the best chance to develop into a caring, productive adult. No one really “wins” a custody battle in a divorce case because the scars may last a lifetime. There are only degrees of losing. The parents lose, their children lose, and society loses.

Over 1 million children a year become children of divorce. Most contested custody cases focus on the *rights* of parents to see and be with their children rather than on the “best interests of the child”—despite rhetoric to the contrary. In contested cases, most parents are represented; their child rarely is. But isn’t the child the real party in interest when parents are litigating custody?<sup>45</sup> Angry, hostile parents demand joint physical custody in situations that make little sense from a child’s perspective.<sup>46</sup> Social science data documents the harm to children from parental conflict.<sup>47</sup> The focus needs to shift from protecting parents’ rights to truly promoting the children’s interests. The standard “best interests of the child” too often equates to the parents’ economic interests rather than the child’s emotional interests.

#### D. Miscellaneous Concerns

##### 1. INCREASINGLY COMPUTERIZED IMPERSONAL SOCIETY

We have moved from the agrarian revolution through the industrial revolution into the information revolution. The end of this century has

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45. See Henry H. Foster & Doris Jonas Freed, *Child Custody and the Adversary Process: Forum Conveniens?*, 17 FAM. L. Q. 133, 141 (1983) (suggesting in contested cases the child should have independent representation and a “watchdog” should review the custody and visitation terms of agreements in uncontested cases). See also Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 FAM. L. Q. 53 (1992); Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523 (1994); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996).

46. *Bishop v. Bishop*, 457 So. 2d 264 (La. Ct. App. 1984) (reversing a custody arrangement to transfer a two year old weekly between the mother’s house in Louisiana and the father’s house in Texas). See Gerald W. Hardcastle, *Joint Custody: A Family Court Judge’s Perspective*, 32 FAM. L. Q. 201 (1998). See also *Ford v. Ford*, 371 U.S. 187, 193 (1962) (“Unfortunately, experience has shown that the question of custody, so vital to a child’s happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where, as here, the estrangement of husband and wife beclouds parental judgment with emotion and prejudice.”).

47. See Catherine C. Ayoub, Robin M. Deutsch, & Andronicki Maraganore, *Emotional Distress in Children of High-Conflict Divorce*, 37 FAM. & CONCIL. CTS. REV. 297 (1999) (citing numerous studies on the effects of divorce on children showing that many enter adulthood as worried, underachieving, lonely, and sometimes angry).

seen the advent of computers, airplanes, televisions, cellular telephones, fax machines, and satellites. The pace of life has increased exponentially. Information travels instantaneously around the world. The world is getting smaller, not geographically, but in terms of the speed of information. At one time, small towns could disassociate themselves from the large cities. Today, Internet, mass communications, and faster transportation systems put everyone within arm's reach. Rural America sees the same MTV as urban America. Whether we want to be or not, we are in the computer age. Our "neighbor" may be someone living thousands of miles away who shares common interests and communicates via email. We have more information available at our fingertips than at any time in history.

The problem is how to master the technology without having it master us. How do we determine fact from fiction? How do we protect creativity? How do we protect privacy? The longer one plays in a virtual world, the more disconnected one can become from the real world. The more time people spend at computer screens, the less time there is for family and friends. Some contend that the more violence, pornography, hate speech, or whatever one sees on computer monitors, television or the movies, the more desensitized we become as a society. We seem to be an "addictive" society with the latest addiction being to the Internet.

## 2. DISTRUST OF INSTITUTIONS

The last half of this century has seen a growing anti-establishment and distrust of institutions. The decade of the 1960s saw men looked upon as leaders with vision—John F. Kennedy, Robert Kennedy, Martin Luther King—assassinated in their prime. Replacement leaders failed to live up to expectations, leaving us with the remnants of the Vietnam War, Watergate, Iran Contra, and Clintongate. Media revelations of corruption almost everywhere have made people distrustful of institutions in which they previously had much faith. Confidence in the presidency and Congress are at an all time low. Distrust of institutions leads to political apathy, and as Carl Schneider suggests, distrust of marriage and relationships.

## 3. A SEARCH FOR ABSOLUTES IN A WORLD WHERE EVERYTHING IS NEGOTIABLE

Americans seem to have a hard time identifying moral absolutes. At one time there was a cultural consensus about many aspects of family life. Today, everything is relative. There are shades of gray everywhere. Someone states with sincerity that he sees nothing wrong with selling

eggs from models for \$100,000 on the Internet. The Human Genome Initiative, charting every difference in our genetic make up, is one-third the way towards completion. Will that make it really possible to rid us of disease? Keep us young? Give us all the opportunity for beautiful, intelligent children? Do we want it to?

## V. Conclusion

Predicting the future is always risky but a few things appear to be sure. The national debate will continue over the definition of marriage and family, and the roles of parents and other caregivers in children's lives. As families become less "traditional," the courts are more frequently asked to make decisions. High divorce and remarriage rates, out-of-wedlock births, and the mobility of today's society will continue into the next century. We have witnessed the instability of the family, increasing societal ills and the impoverishment of children. Lawyers are in a unique position because we work with so many families in distress. As a profession we can work to make the judicial process more accessible and more user friendly.

As a society, we need to develop an ethic in this country that says that children are important. Just as a parent's responsibility to a child should be seen as irrevocable, so should the state and nation's responsibility. We need more responsibility for children by family members, by legislators, by government. As a Florida court once said in a custody dispute, ". . . without prioritizing the physical, emotional and education needs of children, all the efforts to eliminate crime, poverty, and ignorance are only knee jerk band aid solutions which cure none of society's basic ills."<sup>48</sup>

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48. *Costa v. Costa*, 429 So. 2d 1249 (Fla. Dist. Ct. App. 1983).