



ST. MARY'S  
UNIVERSITY

Digital Commons at St. Mary's University

---

Faculty Articles

School of Law Faculty Scholarship

---

1999

## The Diminishing Sphere of the Cooperative Virtues in American Law and Society

Ana M. Novoa

*St. Mary's University School of Law*, [anovoa@stmarytx.edu](mailto:anovoa@stmarytx.edu)

Follow this and additional works at: <https://commons.stmarytx.edu/facarticles>



Part of the [Law Commons](#)

---

### Recommended Citation

Ana M. Novoa, *The Diminishing Sphere of the Cooperative Virtues in American Law and Society*, 3 *Harv. Latino L. Rev.* 49 (1999).

This Article is brought to you for free and open access by the School of Law Faculty Scholarship at Digital Commons at St. Mary's University. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Digital Commons at St. Mary's University. For more information, please contact [sfowler@stmarytx.edu](mailto:sfowler@stmarytx.edu), [egoode@stmarytx.edu](mailto:egoode@stmarytx.edu).

# The Diminishing Sphere Of The Cooperative Virtues In American Law And Society

Ana M. Novoa\*

Those members of American society with the most power and privilege often fail to recognize the extent to which they shape the structure of society as a whole.<sup>1</sup> Subordinated peoples, however, clearly see that it is the protection of the dominant paradigm<sup>2</sup> that drives the economy, the law and, until very recently, popular culture. Women of color,<sup>3</sup> being yet another step removed from the locus of power, see the law from the perspective of “other others”<sup>4</sup> and are all the more aware of the influences that shape the economy and the law.

---

\* Associate Professor of Law and Director of the Civil Justice Clinic, St. Mary's University School of Law. BBA University of Texas, San Antonio; JD University of Texas.

<sup>1</sup> See generally Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal and Contract Law*, 63 U. CIN. L. REV. 269 (1994); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 371, 372, 376, 380, 385 (1991); Christine A. Littleton, *Does It Still Make Sense to Talk about “Women”?*, 1 UCLA WOMEN'S L.J. 15, 48-51 (1991).

<sup>2</sup> See Berta Esperanza Hernandez-Truyol, *Bordered (En)Gendered: Normativities, Latinas, and a Latcrit Paradigm*, 72 N.Y.U. L. REV. 882, 895 (1997).

<sup>3</sup> See Angela Y. Davis, *Women of Color at the Center*, Selections from the Third National Conference on Women of Color and the Law, Keynote Address, in 43 STAN. L. REV. 1193 (1991).

<sup>4</sup> Caldwell, *supra* note 1. See Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395 (1993); Hernandez-Truyol, *supra* note 2 (commenting that latinas “are multiple outsiders”).

This article is an attempt to explore selected destructive developments in American law and society through a retelling of family law history, while analyzing the public/private distinction from my perspective as a Latina deeply influenced by my own cultural heritage, my religion, and my immersion in American family law. The exploration of these destructive developments shows that family law is completely askew. Although family law deals with the most intimate and basic personal relationships – children and parents, wives and husbands, siblings, grandparents – it applies a legal process based on autonomous individual public and private economic rights to those intimate relational realities. It is a hallowed expression of male virtues and a paradigmatic example of the use of the law to protect vested interests and shape society, rather than a reflection of reality.

I argue that the split between the private/family/female and the public/business/male spheres of the nineteenth century created the separation of competitive attributes, virtues, and vices from cooperative attributes, virtues, and vices.<sup>5</sup> This split has had a profound and negative effect on American society.<sup>6</sup>

---

<sup>5</sup> I use the word “virtue” throughout this text to describe the positive side of any human characteristic. For example, the virtue of tenacity is basically the same characteristic as stubbornness.

<sup>6</sup> I discuss the genderization of virtues in *supra* part I.C. Generally, virtues related to cooperation, such as patience, generosity, loyalty, interdependence, and empowerment became associated with women. Virtues associated with competition, such as assertiveness, logic, tenacity, hard work, entrepreneurial skill, and shrewdness became associated with men.

Femininity and masculinity are not mutually exclusive traits that exist on a linear continuum, where possession of one necessarily diminishes the other. Any individual may, for example, be assertive and passive as the situation requires, with a freedom and flexibility that is unavailable to a strongly sex-typed individual. Sandra L. Bem, *The Measurement of Psychological Androgony*, 42 J. CONSULTING AND CLINICAL PSYCHOL. 155 (1974).

Part I of this article questions the roots of the traditional interpretation of the history of family law in the United States, noting that the history of family law is not that of American families, but rather a reflection of elite models and ideals of family. Family law did not develop from the families of all or a majority of Americans, but began with the land-owning, white man of colonial times and followed his descendants into this century. People of color populated the cases, but never drove the development of the law.<sup>7</sup>

Part II explores the family in modern society by reviewing some of the societal changes that affect the family and family law, as well as some of the important current issues in family law. This section compares and contrasts different notions of family, and the responsibilities of family, family law, and society. At the same time, Part II focuses on the following questions: who is responsible for the development of the young? Who will care for the elderly? Will anyone be

---

The economist Victor Fuchs describes the concept of overlapping distributions in explaining the fact that women possess male attributes just as men possess female attributes. He notes, for example, that 17% of women are taller than 65 inches, while 14% of men are shorter than 65 inches, so that some women are taller than some men although men on the average are taller than women. He applies the same concept of distribution around an average to attributes such as logic and aggressiveness. His explanation makes it clear that socialization plays an important part in non-physical gender differences. VICTOR R. FUCHS, *WOMAN'S QUEST FOR ECONOMIC EQUALITY* 32, 38-44 (1988).

<sup>7</sup> This reasoning is analogous to what professor Reynaldo Anaya Valencia called the "invisible/visible minority." Professor Valencia has argued that although Hispanics have historically been instrumental in formulating and developing the criminal law of the United States, the issue of ethnicity, while obviously a factor in the overall case, has been completely ignored. Reynaldo Anaya Valencia, *Latinos in the Criminal Justice System: An Analysis of the Invisible/Visible Minority*, 1 HARV. LATINO L. REV. 28 (1994).

willing to care for other dependent members of our society?<sup>8</sup>

Part III examines the differences between the public and private spheres noted in family law history, and their relationship to public and private law. The distinction between public and private is explained as a function of policy and responsibility rather than inescapable truth. While public law and the public realm are essentially congruent, the relationship between private law and the private sphere is much less direct. The interplay between these spheres and the bodies of law that govern them – public sphere, public law, private sphere, private law – together with the legitimization of male virtues through the ascendancy of law as the most consistent American value, has helped weaken the cooperative virtues, dilute differing cultural practices, change the perception of male and female roles, and establish the hegemony of consumerism.<sup>9</sup>

## I. A RETELLING OF THE DOMINANT STORY

From the perspective of a Roman Catholic, a Mexican-American woman, a mother and wife, a teacher of family law, and a teacher in a clinical program that serves the homeless, family law appears completely askew. Family law deals with the most intimate and basic personal relationships. However, it applies a legal

---

<sup>8</sup> Sociologist Ruth Sidel asked a rhetorical question on a related dream: “Is that the real function of the ideology of the American Dream – the preservation of the current economic system, and when it doesn’t work for all of us, particularly for women, for nonwhites, and for the poor, the shifting of blame from those in power to the victims?” RUTH SIDEL, *WOMEN AND CHILDREN LAST* 192 (2nd ed. 1992).

<sup>9</sup> See STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 175 (1992). Stephanie Coontz provides a wonderful discussion on the hegemonic influence of consumerism and narcissism. *Id.* at 169-79.

process based on autonomous, individual public and private economic rights to those intimate relations. As noted earlier, it is a hallowed expression of male virtues and a paradigmatic example of the use of the law to protect vested interests and shape society.

### A. The Legal and Social Model in Early America

The perspective of economically powerful white men dominates the jurisprudence of the United States. Most of the law that developed from the eighteenth through the twentieth centuries was designed to protect the vested economic interests of these men, and family law is no exception.<sup>10</sup> Traditional family law is essentially the history of the law as it related to the family of upper-class, white, Anglo-Saxon, Protestant men. Beginning with the model family in the original thirteen colonies, and continuing through the post-colonial industrial age of the nineteenth century and into the beginning of the twentieth century, the perspective reflected in family law remained narrow, even as the United States grew in population, diversity, and size. It is worthwhile to review the intricacies of the structure of the family that served as a model for family law.

Traditional family law histories and alternative histories<sup>11</sup> agree that from colonial times until the beginning of the twentieth century, the law recognized the white man as the autonomous owner in family and household relationships. Whatever the individual relationship might have been between any man and his wife and children, servants and slaves, and regardless of whether he exercised the power granted to him by the

---

<sup>10</sup> CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 25 (1966).

<sup>11</sup> See, e.g., Martha Minow, *Forming Underneath Everything that Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819 (1985).

law, the man possessed substantial if not complete power over the person and property of his wife, children, servants, and slaves.<sup>12</sup>

The culturally dominant history holds that, from the colonial period until very recently, the average family has consisted of a nuclear unit made up of man, wife, and children, rather than an extended unit. Only the unprecedented growth of single-parent households has forced a change in that stereotype.<sup>13</sup> Because the legal model has also been based on the assumption that families are and have been nuclear throughout our history, it is faulty on at least two counts.

First, the model ignores the reality that the dominant, white American family, from colonial times until the beginning of the modern era, included servants, apprentices, and slaves on whom its continuation and success depended. The colonial and post-colonial model family was an extended family – one extended not by multi-generational blood relationships but by economic relationships with subservient groups. The nuclear model persisted only because servants, apprentices, and slaves were socially and legally invisible.<sup>14</sup>

---

<sup>12</sup> See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 433-36 (1822); Minow, *supra* note 11; A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR (1978).

<sup>13</sup> A full discussion of current single adult and single parent households is beyond the scope of this article. Historian Stephanie Coontz argues that the current diversity of family compositions is not unusual when compared to family compositions of the past centuries. The nostalgic view of the family as a nuclear, male-centered, hierarchical unit with an employed father and housekeeper mother is an aberration that occurred for only a short period of time in this century after World War II. See generally COONTZ, *supra* note 9.

<sup>14</sup> Although there is a great deal of information available from legal and social records about the middle and upper classes, there is little information about the poor who worked as servants. See Ralph J. Crandall, *Family Types, Social*

Second, a nuclear-based model ignores those cultural traditions in the United States that define family as inclusive of horizontal, vertical, blood, and affinity relationships.<sup>15</sup> Immigrants and long-standing North-American residents alike built social networks around the extended family. The idea of family prevalent in American society<sup>16</sup> and in American law is not part of the Hispanic model.<sup>17</sup>

The use of the Anglo man as the default model person, and the use of his family in the same manner “predetermines the perspective through which [all other] persons are seen, constructed, and exist” in a way that subordinates the identity of the Latina/o<sup>18</sup> and other people of color. It also subordinates the perspective of poor, white men<sup>19</sup> and the stories of women and

---

*Structures and Mobility in Early America*, in CHANGING IMAGES OF THE FAMILY 61 (Virginia Tufte & Barbara Myerhoff eds., 1979). Many of the poor were white immigrants, but the poor also included people of color. See DAVID HAWKE, *THE COLONIAL EXPERIENCE* 156-57, 182-83, 244, 252-53, 289-90 (4th ed. 1966); Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 972-76. “*Los olvidados*” means the forgotten ones. For a discussion of the “relative lack of public identity and legitimacy” as invisibility, see *id.* at 966.

<sup>15</sup> See COONTZ, *supra* note 9.

<sup>16</sup> The Immigration and Nationality Act defines immediate family as parents, spouses, and children. 8 U.S.C.A. § 1101 (West 1997). Most employers define family only as spouses and minor children for purposes of sick and emergency leave, and for inclusion on medical insurance policies. Some employers now include domestic partners, but not other family members. See Littleton, *supra* note 1, at 33-37.

<sup>17</sup> See *infra* part II. In Spanish, there is no concept of “immediate family.” There is also no word in Spanish for “household.” Finally, the concept that connotes an economic relationship as well as co-habitation, is difficult to translate. There are words in Spanish for family and home, however.

<sup>18</sup> Hernandez-Truyol, *supra* note 2, at 895.

<sup>19</sup> See Crandall, *supra* note 14, at 75-79.



children.<sup>20</sup> Women, Latinos, Native Americans, blacks and others were in the Continental United States concurrently with the “Founding Fathers,” but the absence of their voice in the history of American family law is deafening.<sup>21</sup>

Historian John Demos has excused the retention of an unrepresentative perspective because it reflects the aspirations of all Americans.<sup>22</sup> This assumption is untenable because it assumes that all people of color aspire to be white, that they want to adopt the social, political, and cultural history of the Founding Fathers, and that they are willing to give up their own rich heritages. It is surely more plausible that, without power over the law or over words,<sup>23</sup> Hispanics have been unable

---

<sup>20</sup> During the colonial period, “racism had already become a prevalent characteristic . . . and was expressed in societal acceptance of disparate treatment of individuals whose color . . . marked them different from English men and women.” HIGGINBOTHAM, *supra* note 12, at 30. For example, in Jamestown, Indians who came to trade or visit “were placed under guard,” and inhabitants were prohibited from speaking to them “without the governor’s permission.” *Id.* at 30. See also BEARD, *supra* note 10, at 24-25.

<sup>21</sup> See Perea, *supra* note 14. A full analysis of the effects of the legal, religious, and cultural heritage of the South and Southwest is beyond the scope of this article. See generally Julian Guitron, *Mexico: A Decade of Family Law*, 33 U. LOUISVILLE J. FAM. L. 445 (describing family law in Mexico); Carlos Villarreal, *Culture in Lawmaking: A Chicano Perspective*, 24 U.C. DAVIS L. REV. 1193 (1991).

<sup>22</sup> John Demos, *Images of the American Family, Then and Now*, in CHANGING IMAGES OF THE FAMILY 43, *supra* note 14, at 45.

<sup>23</sup> See Nancy Bonvillian, LANGUAGE, CULTURE, AND COMMUNICATION: THE MEANING OF MESSAGES (1993) (discussing dominance and language, and comparing female and male modes of speech, as well as the language of subordinated groups). See also Austin Saraat & F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyers Office*, 98 YALE L.J. 1663 (1989); Clark Cunningham, *A Tale of Two Clients: Thinking about Law as Language*, 87 MICH. L. REV. 2459 (1989); Margaret E. Montoya, *Law and Language(s): Image, Integration and Innovation*, 7 LA RAZA L.J. 147, 147-49 (1994); Hernandez-Truyol, *supra* note 2, at 918-20 (discussing how the Spanish

to make their cultures part of either the dominant history of the United States or the dominant family law history.<sup>24</sup>

The consequences for the family have been enormous: a lack of meaningful public support for values and virtues that strengthen the development of children and the care of elders, combined with the unequal treatment of women, children, and, more precisely, the children of the poor. These consequences highlight the contradictions that exist between family law and family. Family law should be rooted in preserving and protecting intimate relationships; it should help nurture the young and elderly, identify and preserve family stories, anchor young lives with a feeling of occupying a valid place in society. It is rooted, instead, in preserving the same domestic systems that created or expanded the economic empire of the "Founding Fathers" – the white, land-owning males.<sup>25</sup>

Mexico, of course, does not follow the common law system. This has the advantage of diminishing the value of a legal history, which is similar to that of America in its disregard for the underclass and its patriarchal dominance over women.<sup>26</sup> More importantly, in the Mexican culture, the "legal-social psyche . . . believes that

---

language creates the male norm and "renders Latinas languaged out of existence").

<sup>24</sup> For a discussion of colonial Latin America and the colonial caste hierarchy, see Margarita B. Melville, *Hispanic Ethnicity, Race and Class*, in HANDBOOK OF HISPANIC CULTURES IN THE UNITED STATES: ANTHROPOLOGY 85, 94-100 (Thomas Weaver ed., 1994).

<sup>25</sup> In the early years of our republic, only white, landed men could vote, based on the theory that only the landed had a legitimate stake in society. See, e.g., BEARD, *supra* note 10, at 64-71; Charles S. Sydnor, GENTLEMEN FREEHOLDERS (1952), *reprinted as* AMERICAN REVOLUTIONARIES IN THE MAKING 35-37, 42, 147 (1966).

<sup>26</sup> See Melville, *supra* note 24.

men, not laws, rule” while the United States clearly has a “civic culture founded on the rule of law.”<sup>27</sup>

### B. Colonial Times — Mutual Enterprise

The household was the economic and social center of the Northeastern colonies. The typical upper-class or middle-class man may have owned land and may have been a merchant or a professional, but in all cases his economic activity centered around the home. All the members of the household – wife and children, servants, and slaves – labored towards the success of the man/owner’s enterprise.<sup>28</sup> The value of the household determined the status of the man/owner, and the value of the man determined the status of household members, including the servants. The man controlled the family wealth, and governed the family and the household.<sup>29</sup> The family shared in the success of the man, but only to the extent that he used his wealth to improve the family holdings.<sup>30</sup>

The man/owner controlled all of the economic benefits that emanated from his wife, including all of the value of her personal attributes and particularly her competitive virtues. He, of course, controlled any property that she had owned prior to marriage, or earned or acquired during marriage.<sup>31</sup> The Married Women

---

<sup>27</sup> Villarreal, *supra* note 21, at 1193.

<sup>28</sup> See Demos, *supra* note 22, at 49-55. As time went on, the man would maintain his position in the center of a workforce that supported him, even as he moved from the home to the factory.

<sup>29</sup> See HAWKE, *supra* note 14, at 288.

<sup>30</sup> See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953); *The Etna*, 8 F. Cas. 803 (D. Me. 1838).

<sup>31</sup> See BLACKSTONE, *supra* note 12; NORMA BASCH, *IN THE EYES OF THE LAW* (1982); CHESTER G. VERNIER, *AMERICAN FAMILY LAWS, A COMPARATIVE*

Property Acts did not exist until the 1830s, and even then they had little effect on middle-class American women who were generally not endowed with substantial dowries.<sup>32</sup> The Acts provided that property brought into the marriage by the wife remained the property of the wife, rather than being transferred to the husband.<sup>33</sup> Prior to the passage of the Acts, all of the property of the wife were subject to the husband's control and benefit.<sup>34</sup> The Southwest followed the concept of community property with both spouses owning equal shares in the assets of the marriage. However, the husband had the exclusive right to manage all community property, as well as his wife's sole or separate property.<sup>35</sup>

During colonial times, white women worked at the sides of their fathers, husbands, and sons.<sup>36</sup> Women who possessed strong male virtues exercised them through the adult men in the household. Sometimes, a man would allow his wife or daughter to assist in the family endeavor in areas in which she excelled. In addition, women frequently assisted their husbands or acted in their absence.<sup>37</sup> Some women used other means to influence

---

STUDY OF THE FAMILY LAW OF THE FORTY-EIGHT AMERICAN STATES, ALASKA, THE DISTRICT OF COLUMBIA, AND HAWAII (TO JAN. 1, 1935) (1935).

<sup>32</sup> See Mary E. O'Connell, *Alimony after No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437, 462-63 (1988).

<sup>33</sup> See VERNIER, *supra* note 31, at 171-83.

<sup>34</sup> See *Bradwell v. Illinois*, 83 U.S. 130 (1873).

<sup>35</sup> See Antoinette Sedillo-Lopez, *Two Legal Constructs of Motherhood: 'Protective' Legislation in Mexico and the United States*, 1 S. CAL. REV. L. & WOMEN'S STUD. 239, 241-42 (1992).

<sup>36</sup> See Minow, *supra* note 11, at 826.

<sup>37</sup> Women frequently used the power of absent men. Basch reports that as early as the thirteenth century, the law permitted women in England to take part in commercial transactions only when they acted with the permission of, or in the absence of, their husbands. BASCH, *supra* note 31, at 20. Professor Minow tells the story of a woman who even called upon the memory of her dead husband for

their husbands and to exercise their abilities in commerce or organization to advance the fortunes and status of their husbands and family. Because no schism between the public and private spheres had yet occurred, and because the colonial family was not yet separated from the economic center, women found many situations in which they could exercise their strengths and virtues, including those virtues later identified as “male” virtues. However, every such exercise of power was conveyed through informal power and under the auspices of some man.<sup>38</sup> This dynamic still exists in the business sector of Mexico, where some wives act as informal – that is, invisible – managing partners in their husbands’ businesses.

Children were an asset because their economic value as potential helpers and free laborers for their father was greater than the cost to maintain them. Like all other assets, the services of a child belonged to the father. The father, however, also had an obligation to support his wife and children, and he could be deprived of the wages of the child if he refused to support his family.<sup>39</sup> The father also had an absolute right to obedience from his children.<sup>40</sup> The father’s dominion over his children was viewed as ordained by natural and divine law,<sup>41</sup> the same law that gave him dominion over the animals, land,

---

authority when she argued with her current husband. Minow, *supra* note 11, at 855, 864.

<sup>38</sup> See BASCH, *supra* note 31, at 20; Minow, *supra* note 11, at 864.

<sup>39</sup> See *The Etna*, 8 F. Cas. 803 (D. Me. 1938). The father had the right to bargain away the services of the child, see *Plummer v. Webb*, 19 F. Cas. 894 (D. Me. 1825), or to recover as damages the wages paid directly to a child, see *The Platina*, 19 F. Cas. 813 (D. Mass. 1858).

<sup>40</sup> See Crandall, *supra* note 14, at 73.

<sup>41</sup> See *The Etna*, 8 F. Cas. at 805.

women, and people of color.<sup>42</sup> The rights of the father over his children were absolute, even to the exclusion of any rights the mother may have had over her children.<sup>43</sup> A father could deny the mother control over her children even after his death by appointing a testamentary guardian.<sup>44</sup> Custody disputes resulting from divorce were rare, but when divorce or separation did occur, children were awarded to the father without question.<sup>45</sup> Likewise, although divorce was forbidden in Mexico, the father had an absolute right to the custody of his children if separation occurred.<sup>46</sup>

Colonial households also included on a temporary basis the children of friends and relatives, children "bound out" to the man, indigents, and convicts who were placed in the household for rehabilitation.<sup>47</sup> Those in lower classes generally did not form households. Although they occasionally joined together to rent dwellings or stayed temporarily with poor households,

---

<sup>42</sup> See *Bowen v. Gilliard*, 483 U.S. 587 (1987); *McGuire v. McGuire*, 59 N.W.2d 236 (Neb. 1953); *Bradwell v. Illinois*, U.S. 130 (1873); *Dred Scott v. Sanford*, 60 U.S. 393 (1856); COONTZ, *supra* note 9, at 48; Genesis 1:26 to 1:31; St Paul's letter to the Ephesians 5:22 to 5:24. *But see* PAULA M. COOEY, *FAMILY FREEDOM & FAITH* 17-22 (1996) (arguing that the scriptures present us with a more complex view of family and societal obligations).

<sup>43</sup> This makes sense when viewed from the perspective of the powerful, white, landed founders. Society accepted the father's right to the services of others. Although children were not viewed as property, they were certainly part of the vehicle for the acquisition and maintenance of the man's estate. See *The Etna*, 8 F. Cas. 803.

<sup>44</sup> See BLACKSTONE, *supra* note 12, at 441.

<sup>45</sup> See PHYLLIS CHESLER, *MOTHERS ON TRIAL* 3-24 (1986).

<sup>46</sup> See Sedillo-Lopez, *supra* note 35, at 242.

<sup>47</sup> See Crandall, *supra* note 14, at 67-69, 77-79; Barbara Laslett, *The Significance of Family Membership*, in *CHANGING IMAGES OF THE FAMILY*, *supra* note 14, at 231, 236-37; Demos, *supra* note 22, at 47.

people of lower classes usually lived with their employers.<sup>48</sup>

As the sovereign, the man/owner was responsible for the education and socialization of the children. Enlightenment theory of the eighteenth century required that children be taught to read and write. Literacy was viewed as an essential element of the new "republican child" who would grow to be an enlightened adult.<sup>49</sup> Socialization consisted largely of bending children to the will of the father. It was assumed that children who obeyed the man/owner would likewise be obedient to the will of society.<sup>50</sup> Obedience was the paramount virtue in children, and "[p]arents were expected to treat their children sternly to rid them of vices, particularly the sins of pride and disobedience."<sup>51</sup> An important part of socialization for the upper classes included having the children live under the supervision of other relatives and friends, where they were expected to treat the patriarch with the same obedience and subservience as their own father.<sup>52</sup> The children of the middle class were also

---

<sup>48</sup> See Crandall, *supra* note 14, at 75-79.

<sup>49</sup> See GARY WILLS, *INVENTING AMERICA* 208 (1979); HAWKE, *supra* note 14, at 293-95. There was some disagreement, however, as to whether women and people of color were completely human. See WILLS, *supra* note 49, at 220; COONTZ, *supra* note 9, at 48; *Dred Scott v. Sanford*, 60 U.S. 393, 404-05 (1856).

<sup>50</sup> See Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1139 (1985).

<sup>51</sup> Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 491 (1982). Massachusetts and Connecticut statutes enacted in the mid-seventeenth century permitted the death penalty for a child over the age of sixteen who was stubborn or rebellious, or who cursed or struck his parents. *Id.* See also Lawrence Stone, *The Rise of the Nuclear Family in Early Modern England: The Patriarchal Stage*, in *THE FAMILY IN HISTORY* 13, 42 (Charles E. Rosenberg ed., 1975).

<sup>52</sup> See Crandall, *supra* note 14, at 67-69; Laslett, *supra* note 47, at 237.

frequently sent away during puberty, often to serve as apprentices.<sup>53</sup>

Society had an interest in assuring that youngsters were properly reared and that the poor were properly controlled.<sup>54</sup> Although formal legal or governmental intervention in the family was minimal,<sup>55</sup> there was a great deal of informal non-governmental intervention.<sup>56</sup> The shift of dependence and moral behavior to the private sphere had not yet occurred, and there existed a pervasive civil society – one that has substantially diminished<sup>57</sup> – with strong political and moral obligations.<sup>58</sup> The head/owner, and the matriarch as assistant, fulfilled parallel roles in the family and in the community. All members of the community, whether in a position of political authority or not, exercised the freedom to enter the homes of neighbors and tell them with whom to associate, what to wear, and what to teach their children. In one case, citizens looking into the window of a neighbor observed him having sex with a woman not his wife, and proceeded to enter his house and lecture him on the impropriety of his actions.<sup>59</sup>

The family was a microcosm of society.<sup>60</sup> The father was a white, middle or upper-class landowner. He was the unquestioned leader of the household, just as he

---

<sup>53</sup> See Crandall, *supra* note 14.

<sup>54</sup> See *id.* at 78-79.

<sup>55</sup> See COONTZ, *supra* note 9, at 126-27; HAWKE, *supra* note 14, at 157-60.

<sup>56</sup> See Laslett, *supra* note 47, at 245-46; Demos, *supra* note 22, at 48.

<sup>57</sup> See Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995).

<sup>58</sup> See WILLS, *supra* note 49, at 198-206, 235-39; HAWKE, *supra* note 14, at 439-41.

<sup>59</sup> See COONTZ, *supra* note 9, at 126-27.

<sup>60</sup> See Demos, *supra* note 22, at 47; HAWKE, *supra* note 14, at 288-89.



and his cohorts were the leaders of the community.<sup>61</sup> Each household was bound to many other households through intermarriage, personal and business gifts, favors and obligations, and the temporary exchange of children. Thus, the community was a system comprised of interrelated households<sup>62</sup> controlled by powerful patriarchs on the one hand, and of itinerant adults and children from poor or immigrant stock who were tangential to the community on the other hand.<sup>63</sup> Similarly, the family, or more precisely, the household, was a system comprised of an all-powerful patriarch, subservient wife and children, cheap adult and child labor from poor or immigrant stock, and slaves. The household was not a nuclear unit, and the family was not an autonomous private unit as it is today. There was no concept, as there is now, of independence from the community, except insofar as the poor and itinerant workers were shuffled about without regard to established communities.<sup>64</sup> Laborers were tangential but essential to the family, just as they were to the community. They were not part of the master's family unit, and usually did not form family units of their own

---

<sup>61</sup> In the early years of the republic, public involvement and service were essential attributes of the self-reliant, enlightened man. Individualism and autonomy included a strong commitment to solidarity with, and support for, others of the same class. See COONTZ, *supra* note 9, at 96-100; Crandall, *supra* note 14, at 65-66, 68-69, 71-73.

<sup>62</sup> See Demos, *supra* note 22, at 46; Crandall, *supra* note 14, at 65-66, 69, 71; Laslett, *supra* note 47, at 248; HAWKE, *supra* note 14, at 288.

<sup>63</sup> See Crandall, *supra* note 14, at 75-81.

<sup>64</sup> There is little record of the lives and activities of the indigent-laborers. It is likely that they wandered a great deal in search of employment. They lived under crowded conditions; the few who were married usually did not live together as a unit. See Crandall, *supra* note 14, at 76-79.

because they were already tied to the master's household.<sup>65</sup>

Although the household, not the family, was the building block of society, family had not yet become the sole or main locus for intimate relationships. The community and especially other members of the same sex provided the most important intimate relationships.<sup>66</sup> However, a family was at the center of each household, thus rooting family in property relationships.<sup>67</sup> Consequently, as family law developed, it had everything to do with the maintenance of the man as head/owner,<sup>68</sup> and little to do with personal relationships.<sup>69</sup> For example, the law assured the subservience of the wife to the husband<sup>70</sup> and the obedience of the children to the father,<sup>71</sup> but it did not regulate the relationship between the mother and children.<sup>72</sup> Furthermore, although the law regulated the relationship between master and servant,<sup>73</sup> it had little to do with the relationship between the male servant and the servant's wife. Family law had

---

<sup>65</sup> See *id.*

<sup>66</sup> See *infra* part II.A.

<sup>67</sup> Professor O'Connell suggests that maintaining the exchange of property at marriage and the influence of the early church were the primary forces that formalized the institution of marriage. O'Connell, *supra* note 32, at 445.

<sup>68</sup> "As long as the family was intact, the common law treated only its head, the master of master-servant, the guardian of guardian-ward, and the baron of baron-feme." BASCH, *supra* note 31, at 17.

<sup>69</sup> See COONTZ, *supra* note 9, at 65-66.

<sup>70</sup> See BASCH, *supra* note 31, at 17.

<sup>71</sup> See *supra* text accompanying note 61.

<sup>72</sup> See O'Connell, *supra* note 32, at 464. This practice continued for some time. See, e.g., *Larkin v. Woosley*, 19 So. 520 (Ala. 1896).

<sup>73</sup> Early Virginia law, for example, regulated the length of servitude and the punishment available for runaway servants. One statute prohibited trade with a servant without the master's consent. See HIGGINBOTHAM, *supra* note 12, at 33; HAWKE, *supra* note 14, at 289-90.

little to do with the families of the poor. In fact, an entirely separate area of the law dealt with them.<sup>74</sup> Family law, of course, had nothing to do with slaves, who were governed by the law of real estate and chattel.<sup>75</sup>

---

<sup>74</sup> See Crandall, *supra* note 14, at 76, 79. We have a long history of interfering with the family bonds of the poor. During colonial times, for example, family integrity centered around the maintenance and acquisition of property, and the poor were connected to the families of their employers, not to their own relatives. The poor who were not employed, indentured, or owned were excluded from society. Later, after the industrial revolution, social reformers began to save children from inadequate parents, parents who were poor, or parents who were of the wrong ethnic or racial group. See HIGGINBOTHAM, *supra* note 12. See also Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423 (1983). What we might call family law for the poor, or public family law, thus developed as a vehicle for the state to “save” children from poverty by placing them in orphanages. Even after state intervention became based on abuse and neglect, poverty was still a major factor in determining neglect, and the majority of children in state care continued to be from poor families. The poor are still more likely to be reported to child protective services and have their children taken away than are the middle-class. As a result, although a larger number of white children are in state custody, a larger percentage of children of color are removed from their homes. See *id.*; AMERICAN BAR ASSOCIATION PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, AMERICAN CHILDREN AT RISK (1993) [hereinafter AMERICAN CHILDREN AT RISK]; Ira Chasnoff et al., *The Prevalence of Illicit Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Penellas County, Florida*, 322 NEW ENG. J. MED. 1202 (1990); Judith Larsen et al., *Medical Evidence in Cases of Intrauterine Drug and Alcohol Exposure*, 18 PEPP. L. REV. 279 (1991).

<sup>75</sup> See HIGGINBOTHAM, *supra* note 12, at 50-54, 169-70. Many works recount the horrors perpetrated on black families, including the separation of women from their infant children. See, e.g., HARRIET A. JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL (L. Maria Child ed., Harcourt, Brace, Javanovich 1973) (1861).

### C. The Time of the Split: The Home as Refuge

During the eighteenth and nineteenth centuries, increased industrialization in the United States resulted not only in the separation of the female and male tasks, but also in the gender separation of various attributes and virtues.<sup>76</sup> The cooperative virtues became associated with the private/home/female sphere and the competitive virtues with the public/business/male sphere.<sup>77</sup> As in most societies, those duties allocated to men generally received the greatest status.<sup>78</sup> The divesting of cooperative and nurturing virtues from the male sphere and *therefore from the sphere of recognized value*,<sup>79</sup> when

---

<sup>76</sup> The separation of virtues that I describe occurred mainly in the United States.

<sup>77</sup> With industrialization, work took place in the factory or office and relaxation in the home: men worked, children played, and women cared for others. "Things done outside the home are for money, inside the home they are for love." Michele Hoffnung, *Motherhood: Contemporary Conflict for Women*, in WOMEN, A FEMINIST PERSPECTIVE 124-25 (Jo Freeman ed., 1984).

<sup>78</sup> See FUCHS, *supra* note 6, at 32-44. "[T]he anticipation of greater participation by women in high status occupations has resulted in a decline in the prestige and desirability of these occupations by both males and females. The converse was found in female-dominated occupations entered by males." Debra Renee Kaufman, *Professional Women: How Real Are the Recent Gains?*, in WOMEN, A FEMINIST PERSPECTIVE, *supra* note 77, at 353. Certainly women were not allowed authority or rights in the Judeo-Christian tradition. As with children and idiots, women were "protected" through a legal disability. See Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 465-67 (1995). But see Stephen P. Wink & Walter Wink, *Domination, Justice and the Cult of Violence*, 38 ST. LOUIS U. L.J. 341, 346-47 (1993-94) (describing several pre-literate peoples with an absence of domination hierarchies).

<sup>79</sup> See Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 877-78 (1992); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Lois M. Greenwood-Audant, *The Internalization of Powerlessness: A Case Study of the Displaced Homemaker*, in WOMEN, A FEMINIST PERSPECTIVE, *supra* note 77, at 275 (discussing the assumption that the home culture was subordinate to that of the marketplace in American history).

interwoven with our dangerous myth of personal independence, the idea of personal self-reliance, and our acceptance of consumption as a virtue, has had a profound effect on our view regarding the care of children and other dependent members of our society.

The split between the public and private spheres<sup>80</sup> and the resulting split between the male and female roles<sup>81</sup> occurred when fathers left the home to work in the public and political sphere. The emergence of the national market depended on the free rein of competitive attributes, such as ambition, power, and calculation, and its concurrent liberation from the restraints of communal and cooperative transactions. The competitive virtues became necessary for men to succeed in the public sphere, whether for commercial or political purposes. At the same time, it required men to divest the cooperative virtues from their public and private lives. The cooperative virtues were therefor assigned to, required of, and enshrined in women.<sup>82</sup> In fact, the growing individualism of men in the upper classes was wholly dependent on the supportive domesticity of their wives. It was only because cooperative traits were enshrined in their homes that men were able to abandon interdependence and cooperation, and create a fiercely competitive workplace. In fact, "use of the term individualistic to describe men's nature became acceptable only in the same periods, social classes, and

---

<sup>80</sup> Public and private are used to describe two different dichotomies. First, there is the distinction between the private/female/home and the public/male/business/political spheres. Second, there is the dichotomy between the public state and private civil society. *See infra* part II.

<sup>81</sup> *See* COONTZ, *supra* note 9, at 59 ("Liberal capitalism's organization of both society and family depended on a rigid division of labor by gender.").

<sup>82</sup> *See id.* at 55-67; Demos, *supra* note 22, at 53.

geographic areas that established the cult of domesticity for women.”<sup>83</sup>

In the wake of the industrialization of the American economy, the individual self-worth of the man continued to depend on his economic success, but the center of his economic growth moved from the home, where he worked in a communal endeavor with his wife and children, to the marketplace where, according to the dominant history, he worked alone.<sup>84</sup> His individual performance and value were judged by the public market on a daily basis, divorced from the carefully woven fabric of personal lateral relationships. Rather than being valued by a community of familiars, his worth was measured instead by an expanding, national and, most importantly, impersonal market. The need to achieve in the new and non-protective market, along with the need to be the sole supporter for his wife and children, exerted tremendous pressure on the man,<sup>85</sup> who sought solace in the private refuge of his family. The family was the haven of communal interaction for the hard-working man, a place where his sovereignty and security were not challenged, and where he was able to experience the benefits of the soft virtues.<sup>86</sup> The family became the center of – and the symbol for – rest, security, and comfort.<sup>87</sup>

The home was refuge, security, and peace for the man, but not for the woman. It was the wife who was

---

<sup>83</sup> COONTZ, *supra* note 9, at 53.

<sup>84</sup> The man was no longer able to rely on the household members as subservient workers. In addition, business, communal, and political networks were losing importance. *See id.* at 10, 53-58, 64.

<sup>85</sup> The myth of the self-made man required not only that men succeed, but that they do so through the use of competitive individualism and self-reliance. *See id.* at 64.

<sup>86</sup> *See Demos, supra* note 22, at 50-51.

<sup>87</sup> *See Laslett, supra* note 47, at 246.

charged with the exceptional and unrealistic burden of creating a family environment where goodness, peace, tranquillity, and order were centered, and from which they would radiate. An American middle-class wife was expected to be primarily concerned with the good of others<sup>88</sup> and to provide for the common good.<sup>89</sup> Women were required to teach nurturing virtues to their children, while understanding that their male children would eventually break with their example and, at least in public, ruthlessly pursue individual economic gain. Wives were expected to cater to the needs and whims of their husbands, while simultaneously balancing and restraining men's competitive nature sufficiently to provide for the common good.<sup>90</sup>

To meet these expectations, young white women sacrificed their own freedom and became wives and mothers. Although this role was the social norm, there appears to have been considerable resistance to the sacrifice involved: "marriage trauma' was not infrequent and, if severe enough, could lead to women remaining unmarried for life."<sup>91</sup> The pressure of maintaining moral superiority was so great that many middle and upper-class wives suffered from a variety of physical ailments,<sup>92</sup>

---

<sup>88</sup> See *Bradwell v. Illinois*, 83 U.S. 130, 139-42 (1872).

<sup>89</sup> See *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908).

<sup>90</sup> See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* 88 (1985).

<sup>91</sup> *Id.*

<sup>92</sup> "Books written in the period between 1840 and 1900 consistently . . . assert that a large number, even the majority of middle-class American women, were in some sense ill." Ann Douglas Wood, "*The Fashionable Disease*": *Women's Complaints and Their Treatment in Nineteenth Century America*, 4 J. INTERDISCIPLINARY HIST. 25-52, at 26 (1973).

thus leading to the assumption that women were "delicate by nature."<sup>93</sup>

Women of color and poor women could not afford to be delicate by nature; they continued to work as domestics in homes, as laborers in the fields, and as workers in the factories. Many current concepts of femininity are derived from the cult of domesticity and are generally therefore not applied to women of color. Black women, for example, are stereotyped as "independent, competent, worldly, and tough [while] white women [are] . . . dependent and infantile."<sup>94</sup> Competitive traits when exhibited by black women are not viewed positively, but instead are used to place the women "outside of any definition of womanhood."<sup>95</sup> Likewise, Latinas are stereotyped as domesticated and servile housekeepers, and as hot-blooded temptresses.<sup>96</sup>

---

<sup>93</sup> "[I]ll health in women had become positively fashionable and was exploited by its victims and practitioners as an advertisement of genteel sensibility and an escape from the too pressing demands of bedroom and kitchen." *Id.* at 27.

<sup>94</sup> Caldwell, *supra* note 1, at 394.

<sup>95</sup> *Id.* See also Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, WIS. L. REV. 1003, 1034-55 (1995); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM U. J. GENDER & L. 1 (1993).

<sup>96</sup> See Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 818 GOLDEN GATE U. L. REV. 817 (1993). Professor Ontiveros relates that Mexican women are imported as housekeepers, and are then sexually abused and harassed. Many of these women have difficulty in seeking and getting help, in part because their own cultural mores emphasize submissiveness, and in part because our "society considers Latinas naturally sexual . . . often perceived as readily available and accessible for sexual use, with few recriminations to be faced for abusing them." *Id.* at 820. Professor Roberts writes the following about black women: "A popular mythology about Black women . . . was the character of Jezebel, a woman governed by her sexual desires. The ideological construct of the licentious legitimated white men's sexual abuse of Black women and defined Black women as the opposite of the



Even in Mexican or sometimes Mexican-American communities, women are idealized as long-suffering, saintly, and submissive when they are wives and mothers, and temptresses when they are young and unmarried – but in neither case are they weak or fragile. Mexican wives and mothers are perceived as both strong and self-sacrificing, and as the link that binds both culture and family.<sup>97</sup> They are further expected to be submissive with their husbands (who beat them)<sup>98</sup> and servile with their sons (who adore them).<sup>99</sup> Dominant American thought, however, presupposes the white version of women.

The Mexican community did not develop the cults of “domesticity” or of “the self made man” prevalent in American culture.<sup>100</sup> Cooperative virtues and mutual obligations continued to be central to the business and personal relationships of the landed and wealthy of the Southwest and Mexico. Thus, Mexican men did not experience the same loss of community as their American counterparts. Even today, the Mexican workplace and marketplace is greatly influenced by the familial and social ties of its members.<sup>101</sup>

---

ideal mother. Jezebel contradicted the prevailing image of the True Woman, who was virtuous, pure, and white.” See Roberts, *supra* note 95, at 11-12. See also Hernandez-Truyol, *supra* note 2, 912-18 (discussing *marianismo*, the vision of women as submissive, subservient and dependent).

<sup>97</sup> See Hernandez-Truyol, *supra* note 2, at 912-16.

<sup>98</sup> Family violence is prevalent in Mexico, and there are insufficient programs and resources dealing with the problem. See Claudia Diaz Olavarrieta & Julio Sotelo, *Domestic Violence in Mexico*, 275 J. AM. MED. ASS’N 1937 (1996).

<sup>99</sup> See Hernandez-Truyol, *supra* note 2.

<sup>100</sup> The cults of “true womanhood” or “domesticity” and of the “self-made man” are mutually dependent, and polarize human attributes into mutually exclusive camps based on gender. See Novoa, *infra* note 111, at 758-59.

<sup>101</sup> Two of my students from the Civil Justice Clinic recently represented a Mexican national, in a suit to terminate her parental rights. Our client’s sister

The presuppositions of the white middle class were used as the basis for rules concerning children and child custody, in part because divorce and custody disputes were uncommon among the poor.<sup>102</sup> During the industrial revolution, children among the lower classes continued to be an economic asset,<sup>103</sup> while white middle-class children

---

testified that, upon returning to Mexico, our client would have a job with the company where the sister was employed. Opposing counsel was nonplused and cross-examined the sister vehemently, bringing out that the employer knew nothing of the client or her background. The sister was imperturbable; it did not seem the least bit unusual that her employer would offer a job on the sister's recommendation without knowing, meeting, interviewing, or testing the skills of the client. The sister had felt no need or obligation to inform the employer that the client had served jail time. The sister was an important and valued employee and the employer's loyalty would, of course, extend to the client. Similarly, during the 1970s one of my cousins moved to San Antonio from Mexico City. At the time, I was employed in a managerial position with a state agency. He asked me for a job, which I was unable to deliver. I told him that the best that I could do was to refer him to the Human Resources Office. My cousin explained that he would have to compete with all other applicants, but that my recommendation would be of some help after he had met all of the initial job requirements. He was angry with me for a long time because I had refused my responsibility as *familia*. He believed and expected that my employer would hire him just because he was from *mi familia*.

<sup>102</sup> Instead, the poor had custody problems with the states. In colonial Virginia, for example, Indian children were removed "from their parents in an effort to bring up the children surrounded by the English and away from the 'evil' influence of their parents." HIGGINBOTHAM, *supra* note 12, at 31. Later, in the nineteenth century, reformers considered the influence of parents to be "evil" if the parents were poor or belonged to the wrong ethnic or racial group. *See supra* note 74.

<sup>103</sup> Prior to, and at the beginning of, the industrial age, middle-class children were productive members of the household by the age of seven. By the age of fourteen, middle-class children almost did the work of an adult, and were frequently sent to live and work with other families or businesses. As previously noted, fathers had the right to receive the earnings of a child until the child reached the age of twenty-one. *See* Crandall, *supra* note 14. When the employment center for upper-class men moved from the home to the factory, binding out was no longer a workable option. The man was no longer there to educate the children or provide a shining example for the indigent. It was in

became an economic drain.<sup>104</sup> When the economic center shifted to the factory, middle-class children stayed at home with their mothers and became “consumers not producers, . . . [who] were entirely dependent upon their working fathers’ income”<sup>105</sup> for an increasing period of their minority. Simultaneously, the custody of children shifted from virtual sole custody in the father to the adoption of the “tender years” doctrine.<sup>106</sup> The tender years doctrine gave mothers a preference only for the custody of young children, who were generally under the age of twelve.<sup>107</sup> Thus, middle-class women were allowed to keep their children during the years of greatest dependence and greatest cost. Fathers maintained a custodial preference once the children were old enough to be economically profitable.<sup>108</sup> Family law thus remained constant in its function of protecting the economic interests of the man/owner.

In sum, traditional history holds that the colonial family was a collective unit that worked together for the

---

many respects a natural transition for industry to exploit the poor, especially children and young unmarried women, by having them work long hours in poor conditions for little pay. See BEARD, *supra* note 10, at 26.

<sup>104</sup> See FUCHS, *supra* note 6, at 101.

<sup>105</sup> O’Connell, *supra* note 32, at 461.

<sup>106</sup> See, e.g., CAL. CIV. CODE § 138 (West 1872).

<sup>107</sup> See *State ex rel. Galson v. Galson*, 156 N.W. 1 (Minn. 1916) (holding that the welfare of a five-year-old child requires that custody be awarded to the mother, unless the mother is unfit); *Freeland v. Freeland*, 159 P. 698 (Wash. 1916) (holding that courts will not deprive a mother of custody of her child unless it is clearly shown that the mother is so unfit as to endanger the child’s welfare); *Smith v. Frates*, 180 P. 880 (Wash. 1919) (holding that, in divorce cases with children of tender years, the mother is preferred as the custodian, especially for female children).

<sup>108</sup> See Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 112 (1987).

good of both the individual family and the larger community. In that context, the larger community permitted women to express some power and influence. In the post-colonial period, the father left the home to earn a living and support the family; instead of remaining as the economic center, the household became a refuge from the public realm. As a consequence, the public and private realms split from one another. The man existed in the public world of work and politics, but he was also master of the private sphere. The woman, on the other hand, was relegated to the private sphere and was still subordinate to the autonomous, rights-holding man.<sup>109</sup> At the same time, she lost much of her ability to participate in and influence public life.

The traditional story cites the split between the public and the private as a cause of the dramatic loss of women's power.<sup>110</sup> However, it would be more accurate to conclude that, because women did not have any formal power to lose, what was actually lost in the split of the public and private was the public acceptance and recognition of female virtues. It is this loss of an appreciation for the cooperative virtues that has affected not just women, but all of American society.<sup>111</sup>

---

<sup>109</sup> See CYNTHIA FUCHS EPSTEIN, *DECEPTIVE DISTINCTIONS* 2-5 (1988). For a discussion of the public and private realms, see *infra* part III.

<sup>110</sup> See, e.g., Hoffnung, *supra* note 77, at 124-25.

<sup>111</sup> Prior to the split, men were allowed free expression of the cooperative virtues. Society valued both male and female virtues, probably because both were acceptable in men. With the split of virtues into the public and private realms, cooperation, interdependence and gift-giving became appropriate only in the private sphere, in the home, and in women. They were not appropriate in the public, in the business and legal arenas, and in men. Also prior to the split, some women were allowed to exercise male attributes, such as power, business acumen, and aggressiveness through the men in their lives. However, with the shift of men and male virtues to the public sphere, women lost a conduit for their male attributes. See Novoa, *The Removal of Adam's Rib: The Creation and*

Alternative histories take exception to the traditional view of the split and the alleged resultant loss of power by women. Professor Martha Minow, for example, has criticized traditional history for failing to reflect the ways in which women used societal structures to sustain their own informal power and challenge the dominant legal system while “recreat[ing] patterns of connection and care-taking.”<sup>112</sup> Her criticism is valid and well taken, and she presents many previously untold stories of the power and creativity of women. In focusing on the ability of women to assert themselves in a male-dominated society, however, Professor Minow passes over the important effects brought by the divestiture of the cooperative virtues from men and the public sector, and their subsequent allocation to women and the private sector. (The split and reallocation of attributes did occur, at least from a dominant cultural perspective). The allocation of soft virtues to a private/family/female sphere and the allocation of competitive virtues to a public/business/male sphere are two of the many factors<sup>113</sup> responsible for our current societal disregard for the care and welfare of children and other dependent members of society.

A lack of concern for the care and welfare of children and dependent members of society is in contradistinction to communitarian and liberal values, and certainly in conflict with latina/o values. For example, consider that Mexico promulgated its first family code in 1917, thus becoming “the first country in

---

*Polarization of Male and Female Virtues*, 35 U. LOUISVILLE J. FAM. L. 755 (1996-97).

<sup>112</sup> Minow, *supra* note 11, at 838.

<sup>113</sup> The other factors include the development of the cult of consumerism and the increase in narcissism. See SIDEL, WOMEN AND CHILDREN LAST, *supra* note 8, at 101-02. See also *infra* part II.A.

the world to enact a law separating civil law from family law”<sup>114</sup> and creating a family policy to address problems and find solutions.<sup>115</sup> Although that code was eventually replaced, each state and the federal district all have a current family code, and it is “settled that the legal nature of family law is different from that of civil law.”<sup>116</sup> The Mexican Constitution assures the protection and preservation of the family.<sup>117</sup> Unfortunately, Mexico has been very unsuccessful in addressing the problems of family violence. Some studies indicate that a majority of wives in Mexico are abused by their husbands.<sup>118</sup> The Hidalgo State Family Code defines family as an “enduring social institution” and recognizes it as “the fundamental basis of society and the state.”<sup>119</sup> Further, Mexican family law recognizes the wife/mother’s essential role in the care and nurturing of children, a mixed blessing for women.<sup>120</sup> The Mexican example demonstrates that successful alternatives to the American model exist.

## II. THE FAMILY IN TWENTIETH CENTURY AMERICA

The negative consequences of the split of the public and private spheres, and of the concurrent devaluation of

---

<sup>114</sup> Guitron, *supra* note 21, at 445.

<sup>115</sup> See Olavarrieta & Sotelo, *supra* note 98.

<sup>116</sup> Guitron, *supra* note 21, at 445-46.

<sup>117</sup> MEX. CONST. tit. I, art. 4. See also Sedillo-Lopez, *supra* note 35, at 241-42; Guitron, *supra* note 21.

<sup>118</sup> See Olavarrieta & Sotelo, *supra* note 98.

<sup>119</sup> Guitron, *supra* note 21, at 447.

<sup>120</sup> See Sedillo-Lopez, *supra* note 35 (comparing protective legislation in Mexico to that in the U.S.). Women in Mexico have the benefit of being recognized as the primary care-givers for children, a recognition that U.S. women have lost. See *infra* notes 216-22 and accompanying text. The cost for Mexican women has been equality in the workplace.

cooperative virtues, are evident in the way in which family and society are structured in the twentieth century. The structural flaws and contradictions in the family, society, relationships, and the conceptualization and treatment of children and other dependent members of the family need to be remedied.

### A. Family and Society

#### 1. The Cult of Consumerism and Its Corrosive Effect on Hispanic Values.

When soft virtues were banished from the male persona, they were thereby banished from the legal and public realm. The soft virtues were acceptable only in women and the clergy, only in private or in church.<sup>121</sup> Enlightenment philosophy, prevalent in the early years of the United States, promoted self-restraint, hard work, and devotion to the common good. Those values were gradually sacrificed to create and maintain a rapidly expanding national economic market.<sup>122</sup>

Producers created and developed new and larger markets; they fostered a climate of constant change with new varieties in necessities and conveniences, thus instilling in the American consumer a perceived need for luxuries and "improved" commodities.<sup>123</sup> Manufacturers

---

<sup>121</sup> See Martha L. A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2205 (1995).

<sup>122</sup> "By the late nineteenth century, political economists realized that the ethic of hard work and self-restraint that had helped to industrialize America had serious drawbacks now that most industries had the capacity for mass production. If everyone deferred gratification, who would buy the new products?" COONTZ, *supra* note 9, at 169-70.

<sup>123</sup> An economy of abundance, like that in the United States in the early part of this century, "cannot count on any reserve of demand . . . [having already] appeased most . . . necessities. It can all too easily produce more than what most

used advertising to promote consumption on the basis of perceived need rather than genuine need, establishing variety as a prerequisite for happiness.<sup>124</sup> Advertising increased dramatically after the middle of the nineteenth century,<sup>125</sup> and by 1920 consumption was well established and accepted as a necessary public American practice.<sup>126</sup> However, that increase paled in comparison to the 400% increase in advertising that occurred between 1945 and 1960.<sup>127</sup>

The traditional American ideal of liberation from oppression has been transformed into the American ideal of liberation from constancy; freedom and patriotism have been transformed into free consumption.<sup>128</sup> Our quest for liberty has been actualized through the proliferation of market segments that provide us with the liberty to choose from an endless variety of products. The essence of American freedom is now expressed in a nearly infinite variety of consumer choices. We “have learned to experience [liberty] as . . . the freedom to choose everything at once.”<sup>129</sup> The message of advertising aimed at women is that “the American Dream is alive and well.

---

of its members, left to their own unaided imaginations, might consider amenities. It must therefore stimulate appetites relentlessly.” Michael Zuckerman, *Dr. Spock: The Confidence Man*, in *THE FAMILY IN HISTORY*, *supra* note 51, at 192. In recent years, “Americans have been taking on credit faster than their incomes have risen” resulting in a steady increase in personal bankruptcy filings. Fred R. Bleakley, *Personal Bankruptcy Filings Are Soaring*, *WALL ST. J.*, May 8, 1996, at A2. See also Vicki Vaughan, *Credit Cards Blamed for Bankruptcy Rise*, *SAN ANTONIO EXPRESS-NEWS*, January 10, 1997, at 1E.

<sup>124</sup> See RUTH SIDEL, *ON HER OWN: GROWING UP IN THE SHADOW OF THE AMERICAN DREAM* 180, 191 (1990) [hereinafter *SIDEL, ON HER OWN*].

<sup>125</sup> See COONTZ, *supra* note 9, at 170.

<sup>126</sup> See *id.* at 169-73.

<sup>127</sup> See *id.* at 171.

<sup>128</sup> See *id.*

<sup>129</sup> *Id.* at 176.



If you work hard, believe in yourself, and consume relentlessly, you too can be a success in America.”<sup>130</sup> For Latinas/os the temptation is that light skin, joined with the ability to consume voraciously, allows the Latina/o to succumb to the temptation to “pass” into the American myth of personhood.<sup>131</sup> “‘Conspicuous consumption’ is a major marker of one’s social class, [but only] if ethnic/racial boundaries do not intervene.”<sup>132</sup>

In addition to absorbing the ideals of freedom and patriotism, consumerism has also had the unfortunate effect of driving American society toward increased isolation.<sup>133</sup> In the first half of this century, consumption satisfied general and communal basic needs.<sup>134</sup> After the 1950s, however, a shift from communal needs to personal recreation occurred as market strategists engaged in an effort to create additional market demand through the proliferation of market segments. This shift did not result in a decrease in the demand for communal products, but rather a substantial increase in the purchase of products for individual use. For example, the current popularity of computer and virtual reality games, as well as the growing dependence on web surfing, provide individual rather than group recreation, and are “disrupting many

---

<sup>130</sup> SIDEL, ON HER OWN, *supra* note 124, at 101.

<sup>131</sup> See Melville, *supra* note 24, at 101. Professor Melville goes on to point out that the system “has room for . . . a small number of token representatives” who “serve the power elite . . . in order to convince one’s co-ethnics that the system is not rigged against them.” *Id.*

<sup>132</sup> *Id.* at 100.

<sup>133</sup> See SIDEL, ON HER OWN, *supra* note 124, at 101-02; David E. Stannard, *Changes in the American Family: Fiction and Reality*, in CHANGING IMAGES OF THE FAMILY, *supra* note 14, at 83, 88.

<sup>134</sup> Advertising was aimed directly at women and at families through women. Products such as washers, dryers, stoves, and vacuum cleaners were advertised as being helpful to the wife and mother in creating the perfect home-refuge for family members. See COONTZ, *supra* note 9, at 170.

opportunities for social-capital formation.”<sup>135</sup> Chat rooms, listservs, and internet games all give the illusion of community, while in fact serving to isolate the individual by promoting anonymous, distanced human contact that exposes the user to only limited personal emotional risk and no continuing responsibility.

The individual-consumer culture thus fosters the belief that our personal security can be centered on a virtual community and our personal value on products we have yet to acquire.<sup>136</sup> The value structure that has developed within consumer culture is one in which personal worth and status are directly related to consumption and purchasing power. This value system by definition disparages those with little economic power. The consumer culture encourages us to belittle the value of others, through a negative assessment of the products they purchase. Sociologist Ruth Sidel conducted a systematic evaluation of fourteen women’s magazines and found that some of the magazines “openly disparage the lower, middle and working classes,” and that “among the hundreds of features, viewpoints, articles, occasional fiction, advice, and how-to columns, there was not one instance of members of the working class being depicted in a positive light.” She found only two magazines (*Essence* and *Ms.*) where “the well-being of the individual

---

<sup>135</sup> Robert D. Putman, *Bowling Alone: America’s Declining Social Capital*, 6 J. DEMOCRACY 65, 75 (1995).

<sup>136</sup> Bellah, et al. report that “the alternative idea of work as a calling is conspicuously absent” and therefore work is valued “in terms of what it yields to a self” so that the “self stands apart from what it does, and its commitments remain calculated and contingent on the benefits they deliver.” By contrast, a calling requires the giving of oneself in a commitment to the work and the quality of work, so that the self is anchored “within a community practicing” the skill. Work as calling “connects the self to those who teach, exemplify, and judge these skills.” BELLAH ET AL., *supra* note 90, at 69.

is at all connected with the well-being of the larger group.”<sup>137</sup>

Consumerism therefore encourages us to accept “a world view in which every thing or person we encounter is evaluated by its ability to satisfy [our] needs or improve [our] self-images.”<sup>138</sup> Unfortunately, it is in the area of consumerism that advertisers and manufacturers have exploited the desire of ethnic groups to conform to dominant social norms. Marketers have clearly targeted Latinas/os over the past several years, suggesting that Latinas/os can become as good as white if they just purchase as relentlessly as whites. As this advertising campaign is accepted by Latinas/os, the *gringo* ideal of isolated individualism is inculcated into the Hispanic community, threatening one of the greatest strengths of the Hispanic community: reliance on and respect for family and community ties.

## 2. Family as Refuge from the Community

In the twentieth century, Americans began to look to the family to fulfill their socio-emotional needs. At the same time, they also began to look to the self to develop their sense of personal identity. This change marked a deviation from the pre-industrial and early industrial periods when Americans looked to the community to

---

<sup>137</sup> SIDEL, ON HER OWN, *supra* note 124, at 96, 99. Ruth Sidel also points out that “virtually everyone pictured is clearly middle class” or upper-middle class. *Id.*

<sup>138</sup> COONTZ, *supra* note 9, at 175. The teachings of Judeo-Christian social justice clearly point out the dangers of American consumerism and narcissism. Cooperative living, as well as concern for others and the environment, are central themes in the writings of religious scholars. Scholars and ministers alike recognize that the Judeo-Christian message of love and concern for neighbor is contrary to the American fixation with consumption and self-gratification. *See, e.g.,* DANIEL C. MAGUIRE, THE MORAL CORE OF JUDAISM AND CHRISTIANITY: RECLAIMING THE REVOLUTION (1993).

fulfill their socio-emotional needs.<sup>139</sup> The shift has been so complete that John Demos concludes that now “isolated family life [is] the primary setting – if not in fact, the only one – for caring relationships between people.”<sup>140</sup> There is also a greater tendency for children to identify with the family unit, and a lesser tendency for them to identify with the community.<sup>141</sup> This inclination makes it that much harder for second and third generation Mexican-American immigrant families to identify with the entire *familia*<sup>142</sup> – in contrast to the American-style family. This is especially true for such immigrant families that reside outside those areas populated by a substantial latina/o community.

John Demos characterizes the modern American family as an encounter group where each individual seeks and expects fulfillment.<sup>143</sup> Demos believes that the family still serves as a place of refuge today, but suggests that a

---

<sup>139</sup> See Laslett, *supra* note 47 (providing a detailed analysis of various factors that are believed to have caused or influenced this shift); Stannard, *supra* note 132; COONTZ, *supra* note 9, at 42-67, 93-148; Putman, *supra* note 134, at 65-66.

<sup>140</sup> Demos, *supra* note 22, at 60. See also COONTZ, *supra* note 9, at 46, 54-65, 96-98, especially 113-15.

<sup>141</sup> See Laslett, *supra* note 47, at 238-39.

<sup>142</sup> *Familia* obviously translates to family; a closer translation might be “clan.” However, I have a personal bias against using the word “clan” because it is not the word that we use to describe ourselves. Because it is misleading and confusing to use the word *familia* and its American counterpart in close proximity, I often use the word *familia* itself.

<sup>143</sup> Demos, *supra* note 22, at 55-59. See also Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1511-12 (1992) (contrasting the decisions in *Maynard v. Hill* and *Zablocki v. Redhail*). “At the time *Maynard* was decided, and for at least half a century thereafter, the law characterized marriage as an important public institution that carried out vital societal functions. By 1977 . . . both the law and the larger society perceived marriage as essentially a private relationship, the main purpose of which was to promote individual happiness and personal fulfillment.” *Id.*

“new stage in family history” is emerging.<sup>144</sup> Demos’ “new stage” is characterized by an expectation among adults that marriage will provide all of the elements necessary for a full, rich, and exciting life.<sup>145</sup> He argues that the modern family is expected to be a refuge not only from the threat of competition, but also from the boredom of life. Where family once served as the link between the individual and the community, it now protects and isolates the individual from the public world.<sup>146</sup> In other words, using Demos’ description, the home became a refuge from the business world and then from the community. Taking refuge *from* the community rather than *in* the community, was a monumental societal change.

---

<sup>144</sup> Demos, *supra* note 22, at 56.

<sup>145</sup> Robert Bellah and his colleagues make a similar point. They identify two basic philosophical approaches to love and marriage. One is based on the Judeo-Christian view of love as an act of the will that fulfills a moral commitment or obligation. This approach is most commonly associated with evangelical Christians, although it is also obvious among other Christian and Jewish traditions. BELLAH ET AL., *supra* note 90, at 85-112. Under that approach, love “is a willingness to sacrifice oneself for others . . . [it] involves placing duty and obligation above the ebb and flow of feeling, and, in the end, finding freedom in willing sacrifice of one’s own interests to others.” *Id.* at 95-96. The other approach, referred to as the “therapeutic attitude,” is most prevalent in American society today. Unlike other approaches, it is based on autonomous individualism, “including the concept of utilitarian individuals maximizing their own interests.” *Id.* at 104. It requires that persons become self-actualized individuals who are aware of their true needs and feelings. “Love becomes . . . an exchange, with no binding rules except the obligation of full and open communication . . . the mutual exploration of infinitely rich, complex, and exciting selves.” *Id.* at 108. To be self-actualized then is to be liberated from self-doubt, external obligations, and dependencies. *Id.* at 98. For a truly actualized individual, “love means the full exchange of feelings between authentic selves, not enduring commitment resting on binding obligation.” *Id.* at 102. The therapeutic attitude is most consistent with American individualism and with modern consumerism.

<sup>146</sup> BELLAH ET AL., *supra* note 90, at 112.

It is not clear how the *familia latina* fits into his theory. Latino culture did not develop around the concept of the household and the nuclear family, and the idea of the “immediate” family as refuge from competitive capitalism is likewise alien. Most importantly, *la familia* for us still serves as a strong link to those members of our community who do not reside with us.<sup>147</sup> *La familia* provides not just blood-relative links, but also strong networks including *padrinos(as)* and *concuños*. While *padrinos* are godparents,<sup>148</sup> the *concuño* relationship<sup>149</sup> exists between *familias* that are linked by marriage. Even if Latinas/os are not influenced by dominant U.S. norms surrounding the definition of family and family relationship, there is no doubt that we are influenced by dominant U.S. norms surrounding the self-fulfillment aspect of the marriage relationship.<sup>150</sup> Regardless, it is

---

<sup>147</sup> Professor Hernandez-Truyol provides numerous narrative references to *la familia*. She writes, for example, “I was in *familia* with my fellow latin@s – parents, students, colleagues.” Hernandez-Truyol, *supra* note 2, at 886. She also writes, “*Papi* takes *mami* and me home so we can greet the *familia* who is coming to visit and share a meal with us. . . . two sets of *tias y tíos*, as well as a couple of *primas* and one of their partners.” *Id* at 889.

<sup>148</sup> The godparent relationship is created at all religious and quasi-religious events, including baptism, first communion, confirmation, *quinceañera*, and marriage. Furthermore, several of these celebrations permit multiple *padrinas/os*.

<sup>149</sup> For example, my husband’s brother is my *cuñado*, or brother-in-law, and his wife is my *concuña*. I would refer to her birth family as my *concuños*.

<sup>150</sup> Elizabeth S. Scott has written an intriguing article in which she proposes that an enduring marriage can be based on the current view of individual self-fulfillment, and can be legally promoted through contractual pre-commitment theory which would encourage the long-term goals of the couple. Elizabeth S. Scott, *Rational Decision Making about Marriage and Divorce*, 76 VA. L. REV. 9 (1990). She argues that a couple can determine that self-fulfillment “will be promoted by a substantial investment in a stable, interdependent, long-term relationship with a marital partner” and that the couple will be motivated “by a sense of responsibility to their offspring to provide the best possible environment for their children’s development.” *Id.* at 12. *But see* Glen O. Robinson,

clear that if an American marriage fails, divorce is readily available, and family law is historically well situated to protect the dominant property interests<sup>151</sup> and disentangle any economic obligations resulting from the divorce.

### 3. The Privatization of Relationships

Modern American social norms promote personal independence and individual self-reliance<sup>152</sup> as the traditional American value upon which our country was formed, despite the fact that throughout our colonial period personal and social interdependence was recognized as an integral part of individual and communal life.<sup>153</sup> Just as we no longer conceive of ourselves as an independent and self-reliant community (as we did at our inception), we likewise no longer conceive of ourselves even as independent and self-reliant families or households (as we did at the beginning of this century), but rather as independent and self-reliant individuals.<sup>154</sup> Although emotional relationships are still

---

*Communities*, 83 VA. L. REV. 269, 282-94 (1997), (examining the enforcement of long-term contracts, by contrasting them to servitude, and analyzing cases involving contracts between individuals and communal societies).

<sup>151</sup> “Family Court is a place where . . . motions for emergency relief . . . to get temporary support for a child – are scheduled in 15-minute increments, while divorces involving substantial assets, but no children, occupy weeks of courtroom time.” Lee M. Robinson, *The View from the Minors*, 82 A.B.A. J. 74 (1996).

<sup>152</sup> In fact, upper and middle-class families are not independent and self-reliant. They have received and continue to receive considerable subsidies. See COONTZ, *supra* note 9, at 72-73, 84; Fineman, *supra* note 121, at 2205-06.

<sup>153</sup> See Crandall, *supra* note 14, at 65-66, 71-72; Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672 (1992); COONTZ, *supra* note 9, 211-15. See generally Putman, *supra* note 136.

<sup>154</sup> See BELLAH ET AL., *supra* note 90, at 55-84.

conceived as centered in the home generally, ideals such as independence, self-reliance and freedom now center on the individual specifically. Cooperative virtues that once retreated from the public to the private/home during the early industrial period, now appear to be retreating from the home to the individual.<sup>155</sup>

We are communal beings, and our identity should be firmly rooted in a social network.<sup>156</sup> However, American society interferes with the development and maintenance of such a network.<sup>157</sup> The American myths of independence and self-reliance hold that the worth and identity of an individual is based on his or her personal and independent achievement. In other words, worth is tied to personal glorification, not to communal identity. In addition, communal virtues are no longer acceptable in the public sphere, and the worth of the private sphere is now measured by the extent to which it can service the individual rather than the community.

---

<sup>155</sup> See COONTZ, *supra* note 9, at 60-67, 172, 175-78.

<sup>156</sup> Professor Putman concludes that "many major civic organizations have experienced a sudden, substantial, and nearly simultaneous decline in membership over the last decade or two." Putman, *supra* note 134, at 70. He further points out that many of the organizations that showed an increase in membership, such as the Sierra Club and AARP, provide no social connection insofar as members have little or no contact with each other.

<sup>157</sup> Professor Glendon writes:

[t]he problem is that, although we have a highly developed linguistic and conceptual apparatus for thinking about and dealing with individuals, market actors, and the state, we lack adequate concepts to enable us to consider the social dimensions of human personhood, and the social environments that individual men, women, and children require in order to flourish.

Glendon, *supra* note 153, at 674.



Although Mexican culture is highly patriarchal<sup>158</sup> and features a strong tradition of overt male strength,<sup>159</sup> it is also accepting of the free expression of emotions and cooperative virtues among men.<sup>160</sup> Many other “minority” ethnic and racial groups also embrace communal spirit, largely because the allocation of communal virtues to a private/female sphere did not occur in their cultures.<sup>161</sup> Historian Stephanie Coontz documented modern

---

<sup>158</sup> In discussing the changes in the family during the sixteenth and seventeenth centuries in England, Lawrence Stone defines patriarchy in the following way: “the man rides to work on a donkey or mule – if he goes to work at all – while the wife follows behind on foot with the heavy tools. The husband is legally and morally free to beat his wife, although not to the point of maiming or murder . . . . A wife serves the husband and eldest son at the table, but rarely sits down with them.” Stone, *supra* note 51, at 34.

<sup>159</sup> See Hernandez-Truyol, *supra* note 2, at 916-18 (discussing *machismo*). See also Reynaldo Anaya Valencia, *On Being an “Out” Catholic: Contextualizing the Role of Religion at LatCrit II*, 19 UCLA CHICANO LATINO L. REV. 449 (1998).

<sup>160</sup> For example, I knew a man who owned a small grocery store in the barrio in San Antonio. He was a holy man, who knew no strangers and was generous, kind, and supportive of the entire community. The second time I went into his store, he called me “Prima,” the Spanish word for cousin, or “Prima Ana”. I was accepted and adopted; I was family. I was entitled to affection, care, and concern. In his market, there were no arms-length transactions. If anything, he behaved as a fiduciary. I heard his daughter relate how he frequently took homeless individuals or families into their home temporarily, or gave credit that he knew would be “bad.” From an American perspective he was not a successful businessman; he was barely middle-class himself. I am certainly not implying that all Mexican businessmen have the same moral outlook. Nonetheless I do believe that Mexican culture is more accepting of the expression of caring emotions and of sensitivity in men.

<sup>161</sup> See, e.g., Gloria Valencia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN’S L. REV. 69, 86 (1995) (“Native American tribes subscribe to communal values as the guiding principle for the laws that govern an individual’s conduct . . . . Tribal societies are built on community or relational foundations.”). See also GLAZER & MOYNIHAN, *infra* note 246, at 194-216 (discussing the importance of the Italian family).

communal parenting when she was on the island of Lanai:

I greatly appreciated . . . that nearly every community function . . . was open to children. I could sit and socialize and keep an eye on my toddler . . . [even though] the other parents were *not* keeping an eye on their kids. Instead each adult kept an eye on the *floor* around his or her chair. Any child who moved into that section of the floor and needed disciplining, feeding, comforting, or changing was promptly accommodated.<sup>162</sup>

Unfortunately, the hegemonic process of assimilation threatens to neutralize these and other communal traits offered by non-dominant groups.<sup>163</sup> This process also endangers the continued acceptance of the cooperative virtues among all men, among women who participate in the public/business/professional sphere, and increasingly among women in the private sphere.<sup>164</sup>

## B. Family Composition

The proponents of traditional<sup>165</sup> family values notwithstanding, the American debate over what constitutes

---

<sup>162</sup> COONTZ, *supra* note 9, at 210.

<sup>163</sup> See Villarreal, *supra* note 21, at 1195 -1214.

<sup>164</sup> Popular culture, most notably through comedies, is beginning to portray men who possess cooperative and nurturing virtues. This is perhaps a positive sign.

<sup>165</sup> It is not clear whose tradition is invoked when reference is made to traditional family values. However, it is clear that the Latina tradition displays "what U.S. Anglos have come to regard as old-fashioned virtues: devotion to God, to family, despite Anglo misconceptions about siesta and manana, to work." George J. Church, *Immigrants: Hispanics, a Melding of Cultures*, TIME MAGAZINE, July 8, 1985, at 36.

a family has never been resolved.<sup>166</sup> Heated debate surrounds the topic today, although the issue has been contested for more than a century. One of the complexities that has enabled the debate over family composition to continue unresolved is the fact that the definition of family recognized by the law may not be consistent with the familial relationships recognized by distinct cultural and religious groups. A range of compositions has been approved by courts: courts have recognized two men living together to be a family,<sup>167</sup> and some courts have held that several young people in the same household constitute a family.<sup>168</sup> On one occasion, the U.S. Supreme Court said:

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. The accumulated wisdom of civilization . . . supports a larger conception of the family.<sup>169</sup>

To complicate the matter further, the fastest growing nuclear family group in the United States today

---

<sup>166</sup> See COOEY, *supra* note 42, at 27. The Hidalgo State Family Code defines family broadly as "an enduring social institution consisting of a group of people living under the same roof and linked by the legal bonds of marriage, . . . cohabitation, or by consanguinity, adoption or affinity." Guitron, *supra* note 21, at 447.

<sup>167</sup> See *Braschi v. Stahl Assoc.*, 543 N.E.2d 49 (N.Y. 1989).

<sup>168</sup> See *Borough of Glassboro v. Vallorosi*, 568 A.2d 888 (N.J. 1990). *But see* *Cash v. Catholic Diocese*, 414 S.W.2d 346 (Mo. App. 1967).

<sup>169</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977).

is composed of one parent, usually the mother, with one or more children.<sup>170</sup>

While the family described by traditional family law history is a nuclear grouping,<sup>171</sup> the traditional Mexican *familia* is a large, inclusive and boisterous mass of people reaching past the fourth degree of relationship.<sup>172</sup> Anyone with whom one shares a common ancestor by blood, marriage, or affinity is *familia*. *La familia* extends well beyond the household, and the Mexican household tends to be more extensive than its Anglo counterpart. A Mexican home frequently includes several generations, and often includes some collateral relatives as well; parents, grandparents, cousins, aunts, and in-laws might all live together in one home.<sup>173</sup> Thus, the traditional model does not accommodate the Mexican model.

### C. Dependent Members

Historically, women have cared for the home, children, and the elderly and sick in society. Women have

---

<sup>170</sup> Today, one out of every five children is born to a single mother. See FUCHS, *supra* note 6, at 16.

<sup>171</sup> See *supra* part I.

<sup>172</sup> An example is my cousin, Agustín, whose mother was my father's *prima hermana*, See note 173. The first ancestors that we share are our great-grandmother and great-grandfather. Agustín is, of course, a *tío* to my children. He is related to me in the sixth or the third degree depending on the method of computing degrees of relationship. In the Anglo tradition, he might not be my relative at all.

<sup>173</sup> Even our language brings family membership closer together. Hispanics do not append words that separate the relationship. For example, a cousin is a *prima-hermana*, which literally translates to cousin-sister. A second cousin is a *tía* or *sobrina*, which translates to aunt or niece, respectively. A second cousin once removed is just a *prima*, or female-cousin, and the grandchildren of first cousins also call each other *primos*.

been expected to provide this care out of a sense of obligation and commitment, with the understanding that the care of dependent family members has no public status and therefore no public value. By moving into the public world of business, commerce, law, and politics, women have achieved positions with public value only by exercising talents that society has traditionally allocated to the public/male sphere. Men, on the other hand, have for the most part not moved into the sphere of caregiving – the sphere without public value.<sup>174</sup> If the modern family is expected to foster the self-actualization of its adult members and provide excitement and liberation from boredom, where does the demanding task of caring for the children fit? Can the modern model of the family accommodate the heavy burden of providing care for the elderly and the infirm? Does the focus of the modern model lead adults to isolate and ignore children, the elderly, and the infirm?

Ideally men and women alike would understand that, in the modern family, obligations to dependent members are shared and not gender specific.<sup>175</sup> History has not prepared us to accept this idea. Prior to 1500, clan membership or kinship was the principal organizing

---

<sup>174</sup> See S. M. Miller, *The Making of a Confused Middle Class Husband*, 2 SOC. POL'Y 33 (1971); Catherine Ross, *The Division of Labor at Home*, 65 SOC. FORCES 816 (1987).

<sup>175</sup> According to Bellah et al., “the present ideology of American individualism has difficulty . . . justifying why men and women should be giving to one another at all. Traditionally, women have thought more in terms of relationships than in terms of isolated individuals. Now we are all supposed to be conscious primarily of our assertive selves.” BELLAH ET AL., *supra* note 90, at 111. These authors go on to comment on the need to “re-appropriate a language in which we could all, men and women, see that dependence and independence are deeply related, and that we can be independent persons without denying that we need one another.” *Id.*

unit of English society,<sup>176</sup> and the entire extended kinship was responsible for the care of dependent members.<sup>177</sup> The clan lost importance over the next two hundred years as the state became the center of political loyalty and the conjugal family became the center for personal affiliation.<sup>178</sup> As a result of the decline of the clan structure, "welfare functions [such as care of dependent members] were progressively taken over by public bodies."<sup>179</sup> By the early part of the seventeenth century, the clan structure had been replaced by "a fully functioning [public] organization which effectively relieved the kin and also the conjugal family, of much of its responsibility for relief of the poor and sick."<sup>180</sup> The growing unwillingness to fund public social services for dependent members of society has shifted the burden of caring for the poor and sick back to the family unit. However, the modern model family no longer has a kin network upon which to rely for help in meeting such burden. Instead, societal mores encourage individualism and isolation.<sup>181</sup>

Mexican culture is unusual, then, in that it does not disassociate dependent members from the kin network. The 1983 Hidalgo State Family Code, for example, recognizes the need to "protect the sick, the elderly, children, women, men, and families."<sup>182</sup> Ignoring and isolating our elderly and infirm is something that some of us have learned to do after several generations in

---

<sup>176</sup> This explanation is relevant insofar as English law has primarily informed American law.

<sup>177</sup> See Stone, *supra* note 51, at 14-21.

<sup>178</sup> See *id.*

<sup>179</sup> *Id.* at 20.

<sup>180</sup> *Id.* at 21. See also Crandall, *supra* note 14.

<sup>181</sup> See *supra* part II.A-B.

<sup>182</sup> Guitron, *supra* note 21, at 446.

the United States, but for most of us the care of the elderly by *la familia* is part of our life and culture.<sup>183</sup> Caring for the sick, the elderly, and the poor may not be part of the American family history, but it is part of the tradition of the Mexican *familia*. Unfortunately, Latina and non-Latina women alike who cling to the traditional role of family caregiver are generally rewarded with low status and a life style at or below the poverty level.

#### D. Children

Children are uniquely dependent on the family unit. Born defenseless, they require years of care – care ideally provided by adults with whom the child has bonded.<sup>184</sup> Members of the religious right assert that the downfall of the family and, presumably, the societal lack of support for children have been caused by women leaving the home to work.<sup>185</sup> However, if family is defined as the environment where children are cared for and raised, then it is men – not women – who have left the family.<sup>186</sup> It is the elevation of competitive virtues that has diminished the cooperative and nurturing role working family members can play.

Some argue that child rearing is the primary purpose of the family unit and that the protection of children ought to be the primary focus of family law.<sup>187</sup> In

---

<sup>183</sup> See Villarreal, *supra* note 21, at 1219.

<sup>184</sup> See generally J. GOLDSTEIN, A. FREUD & A. SOLNH, *BEYOND THE BEST INTEREST OF THE CHILD* (1973).

<sup>185</sup> Stephanie Coontz provides an alternate explanation, particularly in her discussion on consumerism and narcissism. COONTZ, *supra* note 9, at 169-79.

<sup>186</sup> See SIDEL, *WOMEN AND CHILDREN LAST*, *supra* note 8, at 100-14.

<sup>187</sup> See Barbara Bennett Woodhouse, *Hatching the Egg: A Child Centered Perspective on Parents' Rights*, 14 *CARDOZO L. REV.* 1747 (1993).

Mexico, family law is by nature different from civil law, and the assumptions and precepts of civil law are not applicable to family law.<sup>188</sup> Perhaps if family law in the United States were focused on protecting and nurturing children,<sup>189</sup> the well-being of children in the United States would show positive overall trends. Instead, poverty among children has increased more than among any other group,<sup>190</sup> and children living with single mothers at or below the poverty threshold doubled between 1960 and 1990.<sup>191</sup> Additionally, families with children are the fastest growing segment of the homeless population in the United States.<sup>192</sup> Violence among children has also increased: guns kill or injure forty children every day.<sup>193</sup> The suicide rate for children ages fifteen to nineteen has increased every year for the past thirty years, resulting in a net increase of more than 300% between 1957 and 1987.<sup>194</sup> Illiteracy rates are also alarmingly high.<sup>195</sup> “The

---

<sup>188</sup> See Guitron, *supra* note 21, at 446.

<sup>189</sup> See Woodhouse, *supra* note 187.

<sup>190</sup> According to a report in *Time Magazine*, 10% of children ages three and under live in “extreme poverty – at or below 50% of the federal poverty level.” James Collins, *The Day Care Dilemma*, TIME MAGAZINE, Feb. 3, 1997, at 58. Furthermore, the American Bar Association reports that “nearly one quarter of all children under age six . . . live in families with incomes beneath” the poverty level. *Id.*

<sup>191</sup> See *id.* at 36.

<sup>192</sup> U.S. COMM’N ON SECURITY AND COOPERATION IN EUROPE, Staff Report on Homelessness in the United States 21 (1990). “Families with children are the fastest increasing homeless group and now comprise nearly 38% of all homeless persons in the U.S.” *Hearing before the Select Committee on Children, Youth and Families*, 105th Cong. 3 (1997).

<sup>193</sup> See AMERICAN CHILDREN AT RISK, *supra* note 74, at ix.

<sup>194</sup> See ALLAN L. BERMAN & DAVID A. JOBES, AMERICAN PSYCHOL. ASS’N, ADOLESCENT SUICIDE ASSESSMENT AND INTERVENTION 12-15 (1991); PAUL C. HOLINGER ET AL., SUICIDE AND HOMICIDE AMONG ADOLESCENTS 45, 194 (1994); FUCHS, *supra* note 6, at 104.



United state ranks nineteenth among developed countries for infant mortality rates,"<sup>196</sup> and far too many American children have no health insurance.<sup>197</sup>

Although the American Bar Association, along with many other organizations, has decried the condition of our children, we have no national family policy, no national policy on the welfare of children, and no cultural safety net to protect children.<sup>198</sup> Instead, recent legislation has tossed the full responsibility for the care and welfare of children back to a nation that no longer has a consistent kin network, a nation within which civil society has been unraveling, and where societal mores encourage individualism and isolation but discourage nurturing for others. Relying on the cooperative and communitarian virtues of society is a poor remedy when social and economic success is tied to competitive virtues.

---

<sup>195</sup> Eleven percent of high school graduates are functionally illiterate, and among 19 and 20 year-olds in 1990, only 87% of whites, 78% of African Americans and 60% of Latinos had high school diplomas. See AMERICAN CHILDREN AT RISK, *supra* note 74, at 25.

<sup>196</sup> AMERICAN CHILDREN AT RISK, *supra* note 74, at 35.

<sup>197</sup> *Id.*

<sup>198</sup> I know of no national institution, program, or movement that has as its goal to nurture children, to help young families learn how to parent and nurture children, to provide respite care for parents, and to increase a family and child's connection with the community. There are, however, some local groups that provide these services. As a nation, we do have child protective services intended to save children from abuse and neglect, but state child protective services have been widely criticized both for intruding into the affairs of families and for a failure to adequately protect children from harm. Although we have public education, we do not have universal health care for children or a national family policy.

### E. Child Custody

Family law continues to struggle with the issue of child custody, largely because the traditional legal perspective and the adversarial system are inconsistent with determining what is most beneficial and nurturing for children.

Consider, for example, how different states measure the importance of primary caretaker status. In a majority of states,<sup>199</sup> primary caretaker status<sup>200</sup> neither results in a presumption of – nor is considered a significant factor in the determination of – child custody, despite the fact that continuation of care is beneficial for children.<sup>201</sup>

In light of the fact that women overwhelmingly perform the tasks of care-giving for children and the elderly<sup>202</sup> in this and other societies,<sup>203</sup> opponents of a primary care standard argue that such a standard is

---

<sup>199</sup> See Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 14 WOMEN'S RTS. L. REP. 175, 177-78 (1992).

<sup>200</sup> See *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). See also *Van Dyke v. Van Dyke*, 618 P.2d 465 (Or. Ct. App. 1980).

<sup>201</sup> See, e.g., *In the Interest of Baby Girl Rodriguez*, 940 S.W.2d 265, (Tx. Civ. App.- San Antonio, 1997) (finding that a non-parent may win custody and overcome the statutory parental presumption by arguing on the basis of a young child's attachment to the primary caretaker).

<sup>202</sup> The care of, and the connection to others, is central to the self-image and self-esteem of women. See SIDEL, WOMEN AND CHILDREN LAST, *supra* note 8, at 148-50.

<sup>203</sup> Although we have developed an ideal of equality and cooperation in the home, responsibilities are not in fact shared. Women continue to be primarily responsible for household tasks, child care, and care of adult dependents. Janice Drakich, *In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood*, 3 CAN. J. WOMEN & L. 69 (1989); Fineman, *supra* note 121; Ross, *supra* note 174; Miller, *supra* note 174. See generally FUCHS, *supra* note 6; SIDEL, WOMEN AND CHILDREN LAST, *supra* note 8.

really a disguised maternal one. They argue that a maternal standard devalues the economic care that fathers provide. However, this argument ignores the emotional needs of the child and focuses exclusively on a standard based on economic/market/male values.<sup>204</sup> In other words, an analysis on the basis of economic values is advanced as natural and neutral, while any analysis based on a history of commitment to the care and nurturing of children is viewed as gender-biased.<sup>205</sup> Women are expected to expend more energy, both physical and emotional, in child care, and place more importance on the parent-child relationship than men.<sup>206</sup> Yet, if a man values children in the same way<sup>207</sup> and to the same extent, he is considered extraordinary in his commitment,<sup>208</sup> rather than inferior in his life choices. S. M. Miller, a professor of education and sociology, and a supporter of women's issues writes:

---

<sup>204</sup> "Mothers are still losing custody because their parenting is evaluated more critically than that of fathers and because they have access to fewer financial resources." Polikoff, *supra* note 199, at 175, 178-80.

<sup>205</sup> See, e.g., *Van Dyke*, 618 P.2d 465 (where the trial court found that awarding the child to the mother because she was the primary caretaker would violate the requirement of gender neutrality). See also Fineman & Opie, *supra* note 108, at 119, 127-28.

<sup>206</sup> See FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991); Fineman & Opie, *supra* note 108, at 176; FUCHS, *supra* note 6, at 4, 24, 45, 47, 60-74; June Carbone, *Equality and Difference: Reclaiming Motherhood as a Central Focus of Family Law*, 17 *LAW & SOC. INQUIRY* 471 (1992); Littleton, *supra* note 1, at 48-51; CHESLER, *supra* note 45; Sedillo-Lopez, *supra* note 35, at 252-53.

<sup>207</sup> See CHESLER, *supra* note 45, 49-109.

<sup>208</sup> See Littleton, *supra* note 1, at 43; Polikoff, *supra* note 199, at 180-81 (discussing *Simmons v. Simmons*, 576 P.2d 589 (Kan. 1978), where the mother lost custody because she was working full time, while the father, who also worked full time, had remarried a woman who stayed at home and was available to care for the child).

I guess what dismays me and makes me see my marriage and family as unfortunately typically upper-middle-class . . . – especially in light of my own continuing commitment to an egalitarian, participatory ethos – is that I assume no responsibility for major household tasks and family activities. True, my wife has always worked at her profession [as a physician] . . . [t]rue, I help in many ways. . . . But I do partial, limited things . . . I don't do the basic thinking about the planning of meals and housekeeping, or the situation of the children. Sure, I will wash the dishes . . . I will often do the shopping, cook, make beds . . . but that is not the same thing as direct and primary responsibility . . . my wife expected and was expected to do great things. But with children, she immediately reduced her goals.<sup>209</sup>

### III. PUBLIC AND PRIVATE

I have argued that the American industrial revolution created an ideological incompatibility between the cooperative virtues and the competitive virtues. Cooperative virtues are associated with the private sphere of women and with the church. Cooperative virtues are sometimes given aesthetic value, but never economic value. At the same time, competitive virtues are associated with the public sphere of men, business, economic value, and law. I have demonstrated that the dichotomy between the public/private spheres provides interesting contrasts with the distinction of the

---

<sup>209</sup> Miller, *supra* note 174, at 36-39.

public/private in American law. Of course, the same dynamic plagues the balance of American jurisprudence, as this section explains.

### A. The Distinction between Public and Private

Moral virtues, interdependence, close relationships, and child rearing all fall within the private sphere. Business, commerce, law, and politics all fall within the public sphere. Both public and private law protect interests allocated to the public sphere. Public law is that which is minimally necessary to maintain the “common good”<sup>210</sup> and includes the areas in which law and society can intervene in the life, work, or activity of an individual.<sup>211</sup> The common good was initially understood as liberation from oppression. Laws were designed primarily to liberate citizens from oppression by the state. They were not designed to liberate citizens from the oppression visited by private property owners against any non-landowning, non-white man – or against any child or woman. The common good was defined as, and largely continues to be seen as, the protection of property rights rather than the protection of human rights. The common good was, and for the most part continues to be, defined from the perspective of the landowning gentry, that is, the economically powerful white male.

Private law, like public law, also protects interests allocated to the public sphere. Private law assists the autonomous rights-holding individual in the determination of property rights. Law within the private realm does not help mold or support a communal

---

<sup>210</sup> The common good is defined from the perspective of the landed male.

<sup>211</sup> With morality placed exclusively in the private sphere, we have also been left with no language for, or concept of, a public ethic. See COONTZ, *supra* note 9, at 116-19.

enterprise, however. It has never been the purpose of private law to protect the cooperative role assigned to women and the private sphere during the industrial revolution. Instead, private law protects the male interest in areas not regulated by the public. Private law protects the property rights of one autonomous individual rights holder from intrusion by other autonomous individual rights holders.<sup>212</sup> A primary function of contract, tort, consumer, probate, and even family law is to determine which party has greater rights to certain property – but that law used for determining property rights is neither neutral nor inclusive.<sup>213</sup>

Public law has identified “privacy” as those areas of private choice where legal and societal intervention is prohibited, and therefore where societal responsibility is avoided. Yet, nothing is inherently public or private.<sup>214</sup> The legal distinction is instead a major tool in the shaping of policy and responsibility.<sup>215</sup> “When the line between public and private is crossed, community concern for outcomes produced by social life ceases because those outcomes are conceived as merely the result of private choice.”<sup>216</sup> The private right of controlling one's reproductive choices “serves to isolate and negate the right to call on the community”<sup>217</sup> to share in the

---

<sup>212</sup> “[T]he community is always composed of individuals who also define themselves as rights holders, with private interests potentially at odds with each other and with the collective experience.” Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 *BUFF. L. REV.* 237, 242 (1987).

<sup>213</sup> See Kastely, *supra* note 1; William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 *MD. L. REV.* 1, 12 (1985).

<sup>214</sup> See Freeman & Mensch, *supra* note 212, at 249-53.

<sup>215</sup> See Olsen, *supra* note 79, at 1506-07.

<sup>216</sup> Freeman & Mensch, *supra* note 212, at 243.

<sup>217</sup> *Id.* at 239.

responsibility of parenting. The private right to engage aggressively in the free market results in the transformation of poverty into a private choice; that is, poverty becomes viewed as the result of personal economic failure.<sup>218</sup> The private right to choose the role of mother/caregiver results in a lower economic position upon divorce.<sup>219</sup> The private right to express non-dominant cultural practices allows the market to engage in racial or gender employment discrimination with impunity.<sup>220</sup> One of the most poignant expressions of the distinction between private rights and public responsibility comes from Wendy Anton Fitzgerald in her article, *Maturity, Difference and Mystery: Children's Perspective and the Law*.<sup>221</sup> In offering a critique of *Bowen v. Gilliard*<sup>222</sup> in her article, Wendy Anton Fitzgerald writes, a "child whose hunger threatens bare survival . . . [has no] recourse against the state . . . [because] [u]nder our Constitution, the child is an autonomous individual, ultimately responsible for himself."<sup>223</sup>

The distinction between public and private thus permits the use American family law to avoid public responsibility for values that are deemed part of the private family sphere. The continuation of cooperative values in American society therefore depends solely on the individual.

---

<sup>218</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45, 57 (1905).

<sup>219</sup> See Carbone, *supra* note 206; FUCHS, *supra* note 6.

<sup>220</sup> See Caldwell, *supra* note 1, at 365, and her discussion of *Rogers v. American Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981).

<sup>221</sup> Wendy Anton Fitzgerald, *Maturity, Difference and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11 (1994).

<sup>222</sup> 483 U.S. 587 (1987).

<sup>223</sup> Fitzgerald, *supra* note 221, at 28.

## B. The Non-Expression of Private Virtue

In the private realm of American culture, individuals are alone and isolated.<sup>224</sup> Each individual must make her own connection to a strong subculture that can help unravel the mysteries of child rearing, or help show the way through adulthood, life tragedies, and aging. In America, weakness in the face of any of these life struggles is understood as a purely personal failure.<sup>225</sup>

The communal good of providing support to those confronting life struggles has no national vitality.<sup>226</sup> If individual consumerism is the primary expression of the individual American experience, then the rule of law is the primary public expression of American communal experience.<sup>227</sup> There is no unified American expression of private communal experience. There is no American cultural experience, and no American communal ritual or communal responsibility associated with the private sphere. Parenting is not a communal experience, nor is the coming of age such an experience.<sup>228</sup> There is no

---

<sup>224</sup> See Freeman & Mensch, *supra* note 212, at 245-48 (commenting on the illusion of community); SIDEL, *WOMEN AND CHILDREN LAST*, *supra* note 8, at 195.

<sup>225</sup> There are certainly those who believe that efforts to assimilate can leave us "without the socio-cultural skills to cope effectively with either the Mexican or the Anglo cultural worlds." Villarreal, *supra* note 21, at 1198.

<sup>226</sup> There are support systems available through church groups and private societies, and some regional programs that provide various kinds of family support. Professor Robinson argues that a robust liberalism that respects individual liberty must therefore foster diverse, if insular, communities. See Robinson, *supra* note 150. However, he also makes clear that law protects individuals in community, but does not foster the development or maintenance of communities. *Id.* at 335, 336.

<sup>227</sup> See Villarreal, *supra* note 21, at 1194.

<sup>228</sup> There are several cultural and religious celebrations that recall historic rites of passage. For example, Hispanics celebrate *quinceñeras* and Jews celebrate bar mitzvahs. But these do not in any meaningful way herald the beginning of



consistent communal support or celebration of the marriage unit.<sup>229</sup> Aging is not celebrated as a communal experience. There is no American cultural safety net. There is no unifying American cultural experience, communal ritual, or communal responsibility associated with those things deemed private. As a society, we are following and developing our commercial/self-interest heritage but not developing a cooperative/nurturing heritage. Without a process that follows, develops, encourages, and incorporates cooperative traditions, our society risks losing the ability to express those female virtues. Such a loss would add immeasurably to the tremendous cost already imposed upon families, children, and interpersonal ties as a result of the split of the private and public realms.<sup>230</sup> We are beings created to lead communal lives, but we have created a society that pushes us into isolation.<sup>231</sup>

Many of the American subcultures push their members to support one another.<sup>232</sup> Many cultural

---

adulthood. Likewise, many Americans celebrate high school graduation, which represents the beginning of a transition from adolescence to adulthood for many families. Sociologist Robert Bly argues, however, that the transition is rarely completed, and that most Americans grow middle-aged and elderly without ever reaching emotional adulthood. ROBERT BLY, *THE SIBLING SOCIETY* (1996).

<sup>229</sup> There are still many diverse customs associated with marriage, including simple civil marriages. It is interesting that the rites of marriage have endured even when the parties do not have a religious affiliation.

<sup>230</sup> See Minow, *supra* note 11, at 893-94; COONTZ, *supra* note 9, at 119-21; Demos, *supra* note 22, at 60; Woodhouse, *supra* note 187; Valdes, *infra* note 236, at 293; Fineman, *supra* note 121; Fitzgerald, *supra* note 221; O'Connell, *supra* note 32, at 473, 500; SIDEL, *supra* note 8; SIDEL, *ON HER OWN*, *supra* note 124. See also Putman, *supra* note 57, in contrast with the description of the pre-revolutionary society in WILLS, *supra* note 51, at 189.

<sup>231</sup> See BELLAH ET AL., *supra* note 90, at 84.

<sup>232</sup> My friend, Teresa, relates that when she was a little girl her mother would sometimes send her to the neighbor's house to ask for a little "*ten me aqui*," which literally translates to "have me here" but more accurately means "keep me

traditions continue to celebrate what I have called female virtues – the virtues of cooperation and community-building. Communal activities, whether they be picnics, camping trips, or *tamaladas*<sup>233</sup> create strong bonds and encourage mutual support. To advance similar goals of fostering cooperation, several states are investigating ways in which family law can be more “family friendly.” These states have been doing so by focusing on the continuing needs of children and by helping adults provide a smooth transition to the new family unit existing after divorce.<sup>234</sup>

---

here.” The neighbor would then read Teresa a story, and they would bake cookies, watch television, or play a board game. After approximately an hour she would send Teresa home to a relaxed and rested mother. Mexican culture encourages unrelated women of the community to provide respite, co-parenting and other parental support for each other. My own children are fond of saying that they have several mothers. My daughter, for example, says she has four. I am mommy number one; my sister, *Tia* Carmen, is mommy number two; my daughter’s godmother and her best friend’s mother are mommies number three and four. All of these women have supported my daughter, and in so doing, have supported my own efforts at parenting. We are all role models, teachers, and sometimes confidants.

<sup>233</sup> A *tamalada* is the gathering where tamales are made. From my experience, *tamaladas* include extended family and friends. In addition to the core group that usually works for two or three days, other family members drop in for a few hours and participate. Because *tamaladas* are usually multi-generational, they include children, parents, grandparents, aunts, and uncles. So many people are involved because making tamales is an enormous amount of work and a great deal of fun. In my family, a *tamalada* usually lasts two to three days and results in eighty to one hundred dozen tamales.

<sup>234</sup> For example, Family Law 2000 Task Forces have been created in various states including Texas and California to assess ways in which (1) family law can be more focused on the needs of the children, and (2) the divorce process can be less adversarial.

#### IV. PEOPLE OF COLOR

Champions for the oppressed have succeeded in using the language of freedom and equality in our Constitution to lessen the systemic domination of women that is part of many cultural traditions.<sup>235</sup> They have also used these ideas to reduce the official subordination of non-white groups, a practice that was once taken for granted.<sup>236</sup> The campaign to earn equal rights for women and other dominated groups has improved their position,

---

<sup>235</sup> Systemic domination persists, of course. As Paulette Caldwell recently wrote: Black women cannot wear their hair in braids [in the work place] because Hispanics cannot speak Spanish at work. The court cedes to private employers the power of family patriarchs to enforce a numbing sameness, based exclusively on the employers whim. . . . Like Rogers, the Garcia case is a fascinating study of the extent to which anti-discrimination law can be used to perpetuate the allocation to employers of a kind of property right in the person of women and minority employees. Caldwell, *supra* note 1, at 380.

<sup>236</sup> Francisco Valdes argues that, because the American promise of liberty and equality “was intended only for the privileged, the scourge of non liberty/inequality became embedded in the nation’s heart and soul.” Further, dominant forces in the United States sought to “exclude ‘minorities’ from the liberty and equality that they enshrined as principal values of the new nation.” He concludes that “the Constitution’s design included defects that, because they were of a fundamental nature, have generated acute and continuing tensions throughout the nation’s history.” Francisco Valdes, *Diversity and Discrimination in Our Midst: Musings on Constitutional Schizophrenia, Cultural Conflict, and “Interculturalism” at the Threshold of a New Century*, 5 ST. THOMAS L. REV. 293, 296-305 (1993). Judge Higginbotham makes a similar argument:

[i]f the authors of the Declaration of Independence had said – ‘all white men are created equal’ or even ‘all white men who own property . . .’ they would have more honestly conveyed the general consensus . . . . The irony of the unfulfilled American dream of equality is that of all those . . . who have sought . . . [a] just society, none had to seek out alien sources for moral authority

unless of course they were women. HIGGINBOTHAM, *supra* note 12, at 384.

but the advance has been insufficient.<sup>237</sup> It is insufficient because it judges the essential value of women from the male perspective,<sup>238</sup> and because it judges racial parity from the white perspective.<sup>239</sup> Moreover, it completely fails to recognize the intersection of gender and race or

---

<sup>237</sup> Economist Victor Fuchs concluded that “the economic well-being of women as a whole [in comparison with men] did not improve” since 1960. He further found that although the “women/men ratio of *money income* almost doubled, . . . women had less leisure, while men had more, . . . women [were more] dependent on their own income, and women’s share of responsibility for children rose.” FUCHS, *supra* note 6, at 76.

<sup>238</sup> In discussing female professionals, Ruth Sidel writes that, in medicine, “[t]he male model is the working model.” SIDEL, ON HER OWN, *supra* note 124, at 172. In law, Sidel writes, “it is no coincidence that so many women lawyers are unmarried and so few have children.” *Id.* at 174. In other professions, Sidel writes, “the deck is stacked against women . . . [u]nless somebody acts like a man, she is not perceived as management material.” *Id.* at 175. However, if a woman exhibits characteristics that are too aggressive, such as acting harsh, impatient, or demanding, she is equally punished. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>239</sup> Today, as people of color, we constantly struggle to express our worth as centered in our own ethnic reality rather than in an approximate imitation of white reality. For example, Luis Rodriguez writes:

It’s true many of us become ‘Anglicized’ whether we like it or not, but no one fools anybody. This is mostly strategizing one’s way in the world. . . . The issue, then, is not to assimilate, but to get rooted again, to honor our ancestors, our rituals, our men and women. To know our real names. Our real languages. To celebrate our diverse histories, stories, tongues, faces, and songs.

Luis J. Rodriguez, *On Macho*, in *MUY MACHO: LATINO MEN CONFRONT THEIR MANHOOD* 187, 197 (Ray Gonzalez ed., 1996). Paulette Caldwell poignantly writes:

Some of us choose the positive expression of ethnic pride not only for ourselves, but also for our children, many of whom learn, despite all of our teachings to the contrary, to reject association with black people and black culture in search of a keener nose or bluer eye. Many of us wear braids in the exercise of private, personal prerogatives taken for granted by women who are not black.

Caldwell, *supra* note 1, at 369.

ethnicity.<sup>240</sup> Many advances in our position have been realized through the recognition of male virtues in women,<sup>241</sup> rather than through a recognition of the essential value of female virtues expressed in white women, women of color, or men.<sup>242</sup> Our position has also been advanced within the parameters of a white perspective, rather than within a context that celebrates multiculturalism.<sup>243</sup> As a result, all people of color – women and men – must learn to walk and talk “white” in order to become educated, become professionals, enter the public arena, and in any way become part of the dominant power structure.<sup>244</sup> While we can never be white, some of

---

<sup>240</sup> See generally Caldwell, *supra* note 1; Ontiveros, *supra* note 96. Agela Davis suggests that women of color “have a right to be who we are. We have a right to emerge together from the historically imposed invisibility to which we have been subjected.” Davis, *supra* note 3, at 1177.

<sup>241</sup> Nonetheless, women and especially women of color are frequently criticized for their expression of male virtues. For example, “African American women have been characterized as strong and independent [and] . . . are blamed for the breakup of their families. Often the strength of black women to survive and progress despite the almost insurmountable obstacles is labeled as pathological at one extreme and disloyal at the other.” Ammons, *supra* note 95, at 1054. See also Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

<sup>242</sup> See Bem, *supra* note 6. See also Sandra L. Bem, *Sex Role Adaptability: One Consequence of Psychological Androgyny*, 31 J. PERSONALITY AND SOC. PSYCHOL. 634 (1975).

<sup>243</sup> “Latinas/os growing up in the United States do not create or experience a dominant Latina/o identity narrative, but are imbued with the “American” master narrative, one that does not tell their stories or describe their needs, interests or concerns.” Hernandez-Truyol, *supra* note 2, at 895. Ruth Sidel reports that in her recent interviews with young women, a “lively, bright, articulate twenty-one-year-old” Mexican-American reported that in school “she ‘had to learn white ways.’” Another young woman reported that, in an effort to escape her outsider status, she “tried to be white.” SIDEL, ON HER OWN, *supra* note 124, at 70.

<sup>244</sup> “The hegemony of the upper-class WASP image is still very much a part of our symbol of success and belonging and legitimate authority in this society.” SIDEL, ON HER OWN, *supra* note 124, at 74. There is a well-founded assumption that “the public equates progress for black women with imitation of white women. Because being black is an occasion for oppression, avoiding blackness

us can pass as white<sup>245</sup> and some of our children will become white by thinking white.<sup>246</sup> The resulting change in our children will cause us to wonder whether their being “other” is worth losing that which is good and strong in us.

I wonder sometimes about my own aggressive insistence on asserting my Mexican heritage. When I was a child in the mid-50s, one of my Anglo friends referred to me as Spanish, in order to not insult me. “I am not Spanish! I am Mexican!” I shouted then and have continued to shout since. It is unimaginable to think of myself as anything but brown, in spite of my very white and pink skin. Margarita Melville confessed that she was

---

and its attached cultural associations becomes the essential mechanism of liberation.” Caldwell, *supra* note 1, at 391. Carlos Villarreal describes the negative aspects of the bicultural experience as fragmentation and separatism. Villarreal, *supra* note 21, at 1206-18. Berta Hernandez-Truyol describes the braiding of multi-experience: “hablando español, ingles, lawspeak and layspeak; translating from one to the other, not noticing the transitions as I crossed borders between worlds so familiar I easily avoided their unique obstacles. As if with visceral sensors, I went around the different walls with ease, at least most of the time.” Hernandez-Truyol, *supra* note 32, at 886.

<sup>245</sup> See generally JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN (1995); Hernandez-Truyol *supra* note 2; KEVIN JOHNSON, HOW DID YOU GET TO BE MEXICAN? A WHITE/BROWN MAN’S SEARCH FOR IDENTITY (1999). Many Latinos “pass” as Spanish or Argentinean in the United States, with the expectation that being more “European” might be more “white” or at least more middle-class. In Mexico, some try to pass as European with the hope of being identified with the conqueror. Melville, *supra* note 24; Hernandez-Truyol, *supra* note 2.

<sup>246</sup> See NATHAN GLAZER & DANIEL P. MOYNIHAN, BEYOND THE MELTING POT xxxiii (2d ed., 1970). Kevin Johnson tells stories about his mother and grandmother who were both assimilationists and who both married Anglos. JOHNSON, *supra* note 245, at 186. His brother does not self-identify as Latino. *Id.* at 204. Johnson goes on to say that “assimilation is a process entailing human pain and suffering. There are casualties . . . [and] we should not ignore either the assimilation limits or the toll . . . [a]ll Latinos in the United States, even those who successfully navigate their way . . . are scarred.” *Id.* at 190-91.

able to easily disclose her heritage because as “a relatively ‘white’ university professor [her] own middle class identity was relatively secure.”<sup>247</sup> Kevin Johnson talks about self-identifying as Mexican-American against assumptions that he is Anglo.<sup>248</sup> Would we feel differently if we did not have a choice? Or is ignoring the consciousness of our background too high a cost?<sup>249</sup> Is it possible to keep our relationships, our ability to laugh at ourselves, our commitment to respect,<sup>250</sup> our encompassing and nurturing sense of family, and our willingness to care for children, elders, and the sick, without extending *machismo* and *marianismo*<sup>251</sup> to the point where they permit the abuse of women and children? Is it possible to hold on to the unfamiliarity of the black-white paradigm<sup>252</sup> and to let go of our own class prejudices?<sup>253</sup> If we can, then perhaps our American home, and especially American family law, will benefit from its growing diversity.

---

<sup>247</sup> Melville, *supra* note 24, at 100.

<sup>248</sup> JOHNSON, *supra* note 245.

<sup>249</sup> *See id.*, at 198, 204.

<sup>250</sup> Mexicans conceive of respect as “understanding the fact that different individuals are capable of experiencing the world in very different ways and that being respectful has to do with finding out how another individual sees and feels . . . [w]inning respect from the powerful required resistance and fortitude; it also represented an effort to claim space within a public sphere.” Renato Rosaldo & William V. Flores, *Identity, Conflict, and Evolving Latino Communities: Cultural Citizenship in San Jose, California*, in *LATINO CULTURAL CITIZENSHIP* 57, 69-70 (1997).

<sup>251</sup> *See* Hernandez-Truyol, *supra* note 2, 912-18 (discussing *marianismo*, which envisions women modeled upon Mary, the mother of Jesus, and thus depicts women as submissive, subservient, and dependent. *But see* Barbara Bader Aldave, *The Reality of a Catholic Law School*, 78 *MARQ. L. REV.* 291, 295 (1995) (discussing a different view of Mary as a model).

<sup>252</sup> *See* Hernandez-Truyol, *supra* note 2, at 896-902; Melville, *supra* note 24.

<sup>253</sup> *See* Hernandez-Truyol, *supra* note 2; Melville, *supra* note 24.

## V. CONCLUSION

The traditional family law perspective informs basic assumptions in the law, but it ignores the stories of white women and the stories of the families of slaves, free blacks, Asian immigrants, Native Americans, Mexican-Americans, and the poor. Family law has developed largely to defend the wants and needs of powerful men. Because neither female virtues nor a female view of family has been a substantial thread in the fabric of our law, we have inherited a system that fails to balance competitive and cooperative virtues. Male virtues dominate the public sector, while the cooperative virtues have become increasingly private. When the split between private/female and public/male occurred, American culture lost the sense of communal endeavor that included both men and women. As a society, we lost the influence not of women, but of what I have identified as female virtues.

The American story of the liberation of women occurs concurrently with the gradual and partial break of the subordinated minorities out from under the yoke of the dominant powers. However, while both women and people of color have achieved some legal recognition, neither is – or is poised to become – part of the dominant group from which power flows.

This is so in part because, by recognizing the essential equality of women only through their ability to exhibit male virtues, society has diminished the value of female virtues in the public. Similarly, in asserting that the essential equality of ethnic and racial groups lies in their ability to live with a white perspective, we have lost a rich store of cultural heritages from which female virtues could be developed. Because our tradition is to assimilate ethnic groups into the mainstream through the



“correction” of their deviance from the dominant norms, we fail to capture and retain the strengths of our multicultural heritage. It is these very strengths that, when taken together, could revive a national tradition of communal support for family and parenting. My point is not that minorities, women, or even female virtues generally should be ascendant, but rather that in order for us to advance and survive, we must find a way to make ours a society that rewards both female and male virtues.<sup>254</sup> Such a society would not only value the ability to lead, organize, think, and innovate; it would value the ability to listen, create, feel, and nurture. It would support not only strength and independence, but also struggle and care-giving.

Our society does show an inclination toward recognizing the importance of female virtues in family and especially in parenting. The absence of historical, legal, or public expressions of support for an emerging wholeness is not surprising; cooperative virtues are in direct conflict with ascendant social values such as individual consumerism, and they fly in the face of traditional legal thought and process. Nonetheless, programs like Family Law 2000 show an awareness and willingness to assess what action will be beneficial for children. We certainly could learn from both the successes and the failures of the strong pro-family stance taken by Mexico, as this article demonstrates.<sup>255</sup> The greatest deficit in Mexico’s stance is the centrality of its patriarchy that even now presumes the subordination of women to both men and family. Mexican boys and men easily demonstrate cooperative virtues, while remaining blind to their extensive male privilege.

---

<sup>254</sup> See Valencia-Weber & Zuni, *supra* note 161, at 69-76.

<sup>255</sup> See *supra* notes 114-20, 171-73, 188-89 and accompanying text.

A society with a strong commitment to the preservation of the family cannot be modeled solely on the economic household of traditional history, or on a model that protects family by devaluing women. Still, although most societies are male-dominated, there are numerous systems that value family structure, the nurturing of the young, and respect for elders, and that incorporate female virtues as important societal traits.<sup>256</sup> As a society, we can look to the strengths of our multiple cultural traditions and develop a balance that values the support and nurturing of individuals in all stages of development and through all stages of life changes.

---

<sup>256</sup> Even some systems that we consider oppressively patriarchal incorporate what we identify as female virtues in their legal systems. The case studies in *LAW AND ISLAM IN THE MIDDLE EAST* 49, 85, 143-53 (Daisy Hilse Dwyer ed., 1990), show the importance of personal, family, clan, and village relationships in the application of the law in various Islamic countries. Equality, honor and reconciliation are fundamental Islamic values and are reflected in court proceedings.