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Introduction: Family Law in the 1990s -- New Problems, Strong Solutions

L. Elizabeth Bowles

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SPECIAL PROJECT

Family Law in the 1990s—New Problems, Strong Solutions

INTRODUCTION	677
RENEWING THE GOOD INTENTIONS OF FOSTER CARE: EN- FORCEMENT OF THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980 AND THE SUBSTANTIVE DUE PRO- CESS RIGHT TO SAFETY.....	683
BUYING FERTILITY: THE CONSTITUTIONALITY OF WELFARE BONUSES FOR WELFARE MOTHERS WHO SUBMIT TO NOR- PLANT INSERTION.....	715
CAPITAL PUNISHMENT OF KIDS: WHEN COURTS PERMIT PARENTS TO ACT ON THEIR RELIGIOUS BELIEFS AT THE EX- PENSE OF THEIR CHILDREN'S LIVES	755
HELP! WE'VE FALLEN AND WE CAN'T GET UP: THE PROBLEMS FAMILIES FACE BECAUSE OF EMPLOYMENT- BASED HEALTH INSURANCE	779

INTRODUCTION

The 1992 Presidential campaign was fraught with references to “family values.” While Vice President Quayle took on a fictional television character for choosing to have a child out of wedlock,¹ candidate Clinton was vowing support for the Family Leave Bill and other pro-family measures. Although the political rhetoric of the 1992 campaign

1. Vice President Quayle criticized the fictional character Murphy Brown during a speech at an inner-city high school. He took issue with the character's choice to have a child out of wedlock. Reuters, *After the Riots*, N.Y. Times A20 (May 20, 1992). Later the former Vice President sent the fictional child a stuffed elephant to soften the blows from his prior remarks. Elizabeth Kolbert, *The 1992 Campaign: Political Memo—“Murphy Brown” Feud: When Art Replaces Life*, N.Y. Times A21 (Sept. 23, 1992).

was partisan in nature, the emphasis placed on the family by the political parties reflects the seriousness of the problems facing the American family in the 1990s. The American family is not the same entity that it was twenty years ago. Now, "nontraditional" families, such as single heads of household, divorced families and foster families, outnumber "traditional" families three to one.² The social and economic changes within and around the American family create internal and external conflicts calling for new solutions to resolve emerging problems. The question facing the legal community in dealing with these conflicts will be the extent to which the law can ensure the health, safety, and welfare of the family.

The family has been characterized as a sanctuary, a haven, or a quiet respite;³ however, the family also can be a place of violence, neglect, abuse, and misery. Children born into violent households often are physically, emotionally, or sexually abused, and frequently extend that violence outward to the world around them.⁴ Further, foster children are often lost in the cracks of an overburdened and understaffed system, left to flounder for what support they can garner through their own efforts or to succumb to the cycle of abuse and neglect.⁵ The question of whether the law can provide these children with a means to escape abusive situations plagues foster care reform efforts.⁶

Sometimes children's rights and parents' rights stand in stark contrast to one another. In the much publicized "divorce" last year of Gregory K. from his mother,⁷ the right of children to have their voices heard reached a new plateau. The truth is that children's rights have long been ignored. Until 1874, children were regarded as chattel belonging to their parents. Abused children received legal recognition, not in

2. In 1988, the percentage of American families consisting of a married couple and their minor children was only 27%. Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of the Family*, 104 Harv. L. Rev. 1640, 1640 n.1 (1991).

3. "Home is the resort of love, of joy, of peace, and plenty, where supporting and supported, polished friends and dearest relatives mingle into bliss." James Thomson, Scottish Poet, quoted in *The New Dictionary of Thoughts* 274 (Standard Book Co., 1960).

"Home, the spot of earth supremely blest, a dearer, sweeter spot than all the rest." Robert Montgomery, quoted in *The New Dictionary of Thoughts* at 275.

4. Nancy Traver, *Children Without Pity*, Time 46-51 (Oct. 26, 1992).

5. See Cristina Chi-Young Chou, *Renewing the Good Intentions of Foster Care: Enforcement of the Adoption Assistance and Child Welfare Act of 1980 and the Substantive Due Process Right to Safety*, 46 Vand. L. Rev. 683 (1993).

6. See *id.* (discussing the potential use of Section 1983 actions and substantive due process to help children escape abusive situations and discussing the inadequacy of current foster care statutes).

7. See Pat Wingert and Eloise Salholz, *Irreconcilable Differences*, Newsweek 84-90 (Sept. 21, 1992) (summarizing the background leading up to the "divorce" proceedings).

their own right as people, but under laws barring cruelty to animals.⁸ Not until 1990 did the Supreme Court of the United States finally appoint an attorney to represent a child during abuse proceedings in order to protect that child's rights during the court proceeding.⁹ The case of Gregory K. represented the next major increase in children's rights and starkly presented many of the problems surrounding the family system. Children's rights advocates heralded the step forward,¹⁰ while others feared an explosion of suits based on "misparenting," a subject that these critics believe is better addressed in the home.¹¹ The issue of what constitutes misparenting rises to the forefront when parental religious beliefs conflict with the health and welfare of children, for example, when Christian Scientist parents refuse to seek the medical care necessary to save their child's life.¹²

American families face not only crisis from within, but also from without. Welfare reform and the attempt to keep welfare costs down have presented welfare mothers with restrictions and limitations that do not face more economically advantaged families.¹³ For example, many states now are considering implementing legislation designed to encourage welfare mothers to have fewer children by having them agree

8. In 1874, the state intervened for the first time to protect eight-year-old Mary Ellen Wilson. The American Society for the Prevention of Cruelty to Animals argued that children were part of the animal kingdom and therefore deserved no lesser treatment than an animal. Since animals were protected from barbaric treatment, children should be protected as well. A few months later, the Society for the Prevention of Cruelty to Children was formed by the man who had argued Mary Ellen's cause before the state. Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 Georgetown L. J. 887, 903-04 (1975).

9. *Baltimore So. Serv. v. Bouknight*, 493 U.S. 549 (1990). Before *Bouknight*, children had been provided attorneys for other proceedings, such as criminal trials, but *Bouknight* represented the first time a child had been given an attorney as a guardian ad litem to protect his rights in an abuse case.

10. Howard Davidson, director of the American Bar Association's Center on Children and the Law, views as beneficial the government's current ability to step into areas long considered private: "It is far more likely today that children will be treated with respect and dignity, and that their voices will be heard." Bob Cohn, *From Chattel to Full Citizens*, Newsweek 88 (Sept. 21, 1992).

11. New York University law professor Martin Guggenheim expressed his concern that Gregory would "get his way" by choosing one set of parents over another and later would suffer a breakdown: "The Gregorys of the past were free from these sorts of pressures," he argued. *Id.* at 89. In response, David Liederman, executive director of the Child Welfare League, argued that in cases such as Gregory's, "[w]e're talking about abuse or neglect, where the child is suffering for lack of appropriate parenting." *Id.*

12. See Janet Anderson, *Capital Punishment of Kids: When Courts Permit Parents to Act on Their Religious Beliefs at the Expense of Their Children's Lives*, 46 Vand. L. Rev. 755 (1993).

13. See *Wyman v. James*, 400 U.S. 309 (1971) (holding that a recipient of Aid for Families with Dependent Children was required to submit to a home visit by a case worker to confirm that the money was being used for the child's benefit, while parents in receipt of tax credits for children were not required to submit to in-home inspection).

to Norplant insertion.¹⁴ Since these proposed Norplant laws would have an impact on a woman's right to bear children, the constitutionality of such laws is called into question.¹⁵

Financial concerns also strike at the core of the nuclear family by adversely affecting health care. Families that rely on the system of employment-based insurance often find themselves trapped in a no-win situation when that system fails them.¹⁶ Not only are families left without the means to provide medical care for their dependents, but often they are unable to reinsure once tragedy strikes.¹⁷ When a family must care for a terminally or seriously ill child, family resources and energies are stretched to the breaking point. Such tensions make a job transfer impossible for the parent whose insurance will not follow them to their new job; the possibility of a layoff becomes a nightmare.¹⁸

This Special Project addresses four issues of current concern to family law. It begins with a discussion of the need to establish safe and effective foster care for children. The Project considers current federal legislation that controls state participants in the foster care system, the Adoption Assistance and Child Welfare Act of 1980.¹⁹ The Project argues that this federal legislation creates a cause of action under Section 1983 for failure of the foster care system to make reasonable efforts to return children to their homes. It argues that because the Act sets forth a sufficiently clear legal standard and because private actions are not contemplated by the Act, Section 1983 actions are necessary to effectuate the Act's provisions. Next, the Project argues that the Act creates a substantive due process right and that those due process concerns mandate that children in foster care have a right to safe and effective care from the foster system. This Project concludes that the courts should establish a constitutional right to safe foster care in order to effectuate the purposes of the Act and to protect foster children.

This Special Project then turns to the issues surrounding the current proposition for welfare reform—that welfare mothers be offered money in exchange for Norplant insertion. The Project analyzes such Norplant statutes under Equal Protection and unconstitutional conditions doctrines. It discusses the strands of unconstitutional conditions cases and attempts to determine under what circumstances the Su-

14. See John Hand, *Buying Fertility: The Constitutionality of Welfare Bonuses for Welfare Mothers Who Submit to Norplant Insertion*, 46 Vand. L. Rev. 715, 717-18 (1993).

15. See *id.* at 718-22.

16. See Jeff Pettit, *Help! We've Fallen and We Can't Get up: The Problems Families Face Because of Employment-Based Health Insurance*, 46 Vand. L. Rev. 779, 793-99 (1993).

17. See *id.* at 795-96.

18. See *id.*

19. Pub. L. No. 96-272, 94 Stat. 500 (1980), codified at 42 U.S.C. §§ 620-28, 670-79 (1988).

preme Court would uphold a Norplant law. The Project attempts to determine which factors should be present in an unconstitutional conditions case to ensure a victory for plaintiffs seeking to overturn the statute. The Project argues that certain classes of plaintiffs, such as welfare recipients, and some fundamental rights, such as abortion, are disfavored in the Supreme Court's unconstitutional conditions jurisprudence. The Project concludes that the unconstitutional conditions cases reflect a doctrinal split that results in decisions based predominantly on policy concerns rather than precedent: the extent to which a plaintiff would be successful in a challenge to a Norplant law would be dependent in some measure on the characterization of the right at stake.

Next, the Special Project analyzes the issues that arise when parents' religious beliefs conflict with their child's need for medical care. The Project sets out the problems that arise when parental belief in the power of spiritual healing leads them to refuse to seek medical attention for an ailing child, ultimately resulting in the child's death. The Project analyzes the First Amendment concerns raised by this conflict in the light of two diametrically opposed state supreme court cases, one holding that parents who refuse to seek medical treatment at the point a reasonable person would have done so are criminally liable,²⁰ and one holding that they are not.²¹ The Project also addresses due process and notice concerns raised by conflicting state statutes—those that allow parents to seek alternative methods of treatment and those that criminalize such behavior once it results in permanent injury to the child. The Project concludes that the failure to seek medical care for a child is religiously motivated conduct unprotected by the Free Exercise Clause and that, therefore, parents whose choice of religious treatment for their children results in death or serious bodily injury should be held criminally liable.

This Special Project concludes by surveying the problems facing American families as the result of employment-based health care insurance. The Project looks at the history leading up to the current insurance system and modern reforms to make insurance more easily accessible to the family. The Project discusses the difficulty families face due to the inability to transfer insurance coverage from a prior job to a new job. Families whose breadwinners choose to change jobs or are laid off may find either that they are totally uninsured or that they are unable to get employment-based insurance for family members with recurrent or serious medical problems. The Project notes that this result means that families often cannot afford the quality of medical care nec-

20. *Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988).

21. *Hermanson v. State*, 604 So. 2d 775 (Fla. 1992).

essary to maintain the family's health or to protect against catastrophic illness. The Project argues that the current system places families in an untenable situation—it requires families to pay escalating insurance premiums while receiving fewer insurance benefits to cover increasingly expensive medical care. This Project concludes that the federal government should modify employment-based insurance and health care costs so that no American families have to face illness without the means to achieve a cure.

*L. Elizabeth Bowles**
Special Project Editor

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