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The Family Franchise: Elderly Parents and Adult Siblings

Margaret F. Brinig*

*Weakened is not enough. Destroyed isn't enough.
He's got to repent and feel humiliation and regret.
I won't be satisfied until he knows what he is.*¹

*Beach picnic or hayrack ride,
Fishing stories told with pride,
Told and retold around the fire,
White the hot flames mounted higher.
Great grandchildren love you now,
Is it any wonder how,
Each year with glee this sign they greet,
"Grassie Cottage—Merrymeet."*²

I. INTRODUCTION

I would like to begin with two stories about families and places over time. Both are modern, but one is fictional (from Jane Smiley's *A Thousand Acres*)³ while the other is real (from the *Duluth News-Tribune*).⁴

In the first, the story begins with a widower who owns a very large family farm in Iowa. He wishes to retire and to give the farm to his three married daughters.⁵ Two of the daughters reside in

* Professor of Law, George Mason University. I owe thanks to colleagues F.H. Buckley, Lloyd Cohen, Claire Hill, and Francesco Parisi; the participants in the University of Utah College of Law Family Law Symposium; Professor Stephen Van Evera of the political science department at MIT; and Professor Carl E. Schneider. I thank students Tracy Brandt and Emily Frye for their able assistance.

1. JANE SMILEY, *A THOUSAND ACRES* 216 (First Ballantine Books 1992) (1991). Rose, the oldest of three sisters, is speaking of her elderly father.

2. Elizabeth G.N. Earls, untitled poem from 1936, in *The Annals of Merrymeet* (unpublished family diary), reprinted with permission in Mark Stodghill, *Cottage Sparks Fond Childhood Memories*, *DULUTH NEWS-TRIBUNE* (Minn.), July 29, 1995, at 1A.

3. SMILEY, *supra* note 1.

4. Stodghill, *supra* note 2.

5. Smiley's book somewhat parallels an older story. In *King Lear*, Shakespeare tells us that the old king's strength is failing. He loves each of his three daughters exceedingly, and although he loves the youngest more than the others, he strives to be fair: He will divide his substantial kingdom in three shares, giving one-third to

their own homes on the family property, working as farm wives;⁶ the third lives in Des Moines, practicing law.⁷ The two who have remained nearby are at first happy when the lawyer sister refuses her share.⁸ But after a while, things disintegrate to the point where one of the farm wives concocts an elaborate scheme to kill the other and the family ends up in court.⁹ The struggle is about the farm property, of course, but even more it concerns positions in the family and how these positions change as the sisters and their father age.¹⁰ The embittered daughter, Rose, describes to her sister that she wants her father destroyed. The sister, Ginny, thinks that it "was incredible to me to hear Rose speak like this, but it was intoxicating too, as sweet and forbidden as anything I had ever done. I couldn't resist her. I said, 'Rosie, I understand. I'm with you.'"¹¹

In the second tale, a Scottish minister moves to the upper Midwest and purchases a home on Madeleine Island in Lake Superior. One hundred years later, his progeny all converge on the place to celebrate together.¹² They point out height marks placed years ago

each. WILLIAM SHAKESPEARE, *KING LEAR* act 1, sc. 1, lns. 36-45 (John D. Wilson ed., Cambridge Univ. Press 1984). This, however, is only the presumptive amount, for he gives each daughter an opportunity to demonstrate why she should be given more than a one-third share. You will remember, the first, Regan, says at some length that she loves him more than life itself. *Id.* at lns. 55-61. The second, Goneril, says she loves him as much or more than Regan does—more than anything else in the world. *Id.* at lns. 69-76. As the youngest, Cordelia, points out, Goneril loves Lear more than her intended husband. *Id.* at lns. 99-106. Cordelia refuses to engage in this game of flattery. She points out that she knows how much her father loves her and that she loves him that much in return, exactly as a daughter ought. *Id.* at lns. 87-104; see also Flora A. Steele, *Caporushes*, in *ENGLISH FAIRY TALES* 280 (1918) (retelling fairy tale of man with three daughters who questions their love for him). Of course, the rest of the tragedy involves the competition for greater shares that takes place between the two oldest, Regan and Goneril. Lear fails to see the truth in what his favorite child has told him and succumbs to the flattery of the others. The play is complicated by a parallel dispute between the illegitimate and legitimate sons of the Duke of Gloucester, showing, among other things, that this problem is not confined to female offspring. See also SMILEY, *supra* note 1, at 120-28, where two brothers at a neighboring farm engage in a parallel set of disputes.

6. SMILEY, *supra* note 1, at 6-13. The daughter Rose is portrayed as greedy and intolerant, the narrator Ginny as indecisive, and Caroline as unwilling to take responsibility for or be involved in providing care for their elderly and widowed father. *Id.*

7. This is the youngest daughter, Caroline (the parallel to Shakespeare's Cordelia), who moves away and gains distance from the family and the farm. *Id.* at 13-20.

8. *Id.* at 36-39. In *King Lear*, the two eldest children form the initial alliance. SHAKESPEARE, *supra* note 5, at lns. 283-306.

9. SMILEY, *supra* note 1, at 311-14, 318.

10. See *id.* at 315-26.

11. *Id.* at 216.

12. Stodghill, *supra* note 2, at 1A.

on an upstairs bedroom wall or a table at which they played as children.¹³ They remember all the special times: the joyful first meetings and reunions of cousins spread all over the country. Most of all, each relates the sense of peace and acceptance and place associated with the old white clapboard house. "I have so many happy memories throughout the years here," one great-grandchild said. "It's a place you could come to and just sort of be yourself and everybody always accepted you."¹⁴

Families persist despite legal changes and obstacles.¹⁵ My point is that law can either ease the transitions families inevitably make or it can make them substantially more difficult. When law eases transitions, as in the second story, the offshoots are peace and growth, because the parties rest in what economists would call an equilibrium. When law makes transitions more difficult, as in the first story, the results are moral-based regret and longing—a disequilibrium.

In this paper, I am going to concentrate on one family transition where we have established substantial legal barriers—that of emancipation. However, I will briefly allude to other "broken families," such as the divorcing family and the family divided by adoption.

As students of the family, we are preoccupied with divorce. We write about families in crisis and use the fabric of their lives worn thin and stretched to the breaking point to develop our ideas about what families are and even what they ought to be. In a way, of course, law teaching and the Socratic method drive us toward such family autopsies. Happily, most of us live most of our lives in families that are much healthier: We grow, we develop trust, and we dare to share ourselves with the special people in our inner circle.¹⁶ Much of the law that is in the broadest sense family law—frequently the unexplored law—protects us and encourages us and sometimes even pushes us to live within families in particular ways.¹⁷

13. *Id.*

14. *Id.*

15. Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 252-53 (1975).

16. For descriptions of the creation of intimacy, see MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* *passim* (1993), and Jennifer R. Morse, *The Development of the Child*, Address at the George Mason University Liberty Fund Symposium on the Family, the Person and the State 62 (March 1995) (focusing mainly on parent and child) (transcript on file with author).

17. See Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497-98 (1992).

What I would like to do today is to launch my own exploration into what family means in a peculiar context, one in which it seems that there are few legal obligations but some of the strongest and most important relationships in life. Today I want to focus for awhile on what I call the family franchise—the relationships present even after the strongest legal bonds are broken by emancipation, adoption, or divorce. Perhaps you share some of these situations as well. I first think about my elderly and increasingly idiosyncratic parents. I have siblings with families of their own who nonetheless taunt me with snatches of remembered intimacy. I consider the father of my children, who—though we are no longer legally husband and wife—daily teaches me about responsibility and faithfulness. Finally, I dwell on my oldest child, whose birthday was my happiest day, and who is now beginning her own independent life in college. I know these are all people to whom I am somehow, thankfully, forever closely bound. Despite such people's importance in our lives, we do not spend much time in law school courses thinking about them, about how we as lawyers and lawmakers can strengthen these relationships.

To tie these into more general observations, I hope to show how this largely untraversed area of family law relates to the concerns we have treated as more central in our courses—in particular, the laws relating to provision for minor children and those relating to marital property. On a still more global level, I wish to suggest that the current preoccupation with "rights"¹⁸ forces us into a less-attractive model. It need not be so.

*Families are better together. Working together. . . . The kind of life people lead in this country is getting rarer and rarer. Three generations on one farm, working together, is something to protect.*¹⁹

*Merrymeet is the one place in my lifetime that hasn't changed. . . . Everything else in life has changed so dramatically, and this is a constant. This cottage is absolutely the same.*²⁰

Even though most of us have lost the family farm, and certainly Lear's kingdom, we can still discover (or begin) family traditions which are frequently centered around one place. Home places bring us back from our diaspora to a shared family experience. However,

18. See, e.g., MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 121-30 (1991) (discussing "rights" related to various family law issues).

19. SMILEY, *supra* note 1, at 266.

20. Stodghill, *supra* note 2, at 1A.

for some there is no family place. When physical closeness, though best, is impossible, modern communication developments such as electronic mail can be a wonderful family unifier.²¹

Before I begin modelling families, I want to describe briefly two different ways that I (and others) have pictured families. In much of my earlier theoretical work on families, I have argued that many of a family's workings can be described in terms of two models: the market or contract model²² and the firm or covenant paradigm.²³ The contract model is particularly useful in describing the law and relationships that govern parties about to enter into family relationships, for example, courtship, marriage, and adoption.²⁴ To some extent, contract may also be appropriate for framing the context of dissolving families: those disrupted by separation, divorce,²⁵ or termination of parental rights.²⁶ However, dragging contract law from its usual commercial context into family law has serious drawbacks. The most obvious drawback is that contract law is virtually useless for treating love, trust, faithfulness, and sympathy, which more than any other terms describe the essentials of family.²⁷ The sec-

21. Joel Garreau, *Thanksgiving in Cyberspace: A Far-Flung, Close-Knit Family's Computer Network*, WASH. POST, Nov. 25, 1993, at B1 (discussing closeness maintained by one large family through electronic mail).

22. See Margaret F. Brinig & Michael V. Alexeev, *Fraud in Courtship: Annulment and Divorce*, 2 EUR. J.L. & ECON. 45, 49-51 (1995); Margaret F. Brinig, *The Effect of Transactions Costs on the Market for Babies*, 18 SETON HALL LEGIS. J. 553, 553-60 (1994); Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 870-73 (1994); Margaret F. Brinig, *Rings and Promises*, 6 J.L., ECON. & ORGANIZATION 203, 204-13 (1990).

23. See MARGARET F. BRINIG, MEN, WOMEN AND CHILDREN: THE LAW AND ECONOMICS OF THE FAMILY 8 (forthcoming 1996) (on file with author); Margaret F. Brinig, *Status, Contract and Covenant*, 79 CORNELL L. REV. 1573, 1594-99 (1994) (reviewing REGAN, *supra* note 16).

24. See Marjorie M. Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 231 (1982) (discussing prenuptial agreements).

25. See, e.g., Brinig & Crafton, *supra* note 22, at 892-94 (indicating no-fault divorce precludes enforcement of marriage promises); Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TULANE L. REV. 855, 894-905 (1988) (advocating fault as measure of which party should bear losses in divorce); June Carbone, *Economics, Feminism and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463, 1463-68 (1990) (criticizing Ellman's divorce theory and advocating a restitution theory); Arthur B. Cornell, Jr., *When Two Become One, and Then Come Undone: An Organizational Approach to Marriage and Its Implications for Divorce Law*, 26 FAM. L.Q. 103, 120-29 (1992) (using organizational rather than economic theories to describe divorce problems).

26. See Margaret F. Brinig, *The Nature of the Contract Between Parent and Child*, Prepared for the George Mason University Liberty Fund Symposium on the Family, the Person and the State 1-4 (Mar. 1995) (on file with author).

27. See, e.g., REGAN, *supra* note 16, at 1-5 (noting complexities of applying legal standards to interpersonal rights); Brinig, *Status, Contract and Covenant*, *supra* note

ond problem is that contract law implies the possibility of breach. When a better deal comes along, it may be more appropriate to breach, pay damages, and recontract with an inviting third party.²⁸ However, when people are involved, particularly children, paying damages doesn't really compensate. One's affections are not and, normatively speaking, should not be readily transferable.²⁹ Moreover, the idea of continually being on the lookout for better family "deals"—better spouses, children or parents—destroys family life.³⁰

Covenant, therefore, is preferable for describing families that are well underway—for illuminating the relationship between husband and wife or parent and child.³¹ Covenant implies a particularly serious agreement that has characteristics of permanence and unconditional love. The parties are bound not only to each other, but with some third party (God or the state or both).³² But when children reach adulthood and leave their parents, or when couples divorce,³³ the law no longer binds them. What happens to the covenant—the forever and unconditional part?

23, at 1573 (arguing for return of intimacy in legal family relationships); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1832 (1985) (noting that family may act in ways unsusceptible to continuing discourse).

28. Brinig, *Status, Contract and Covenant*, *supra* note 23, at 1586 & n.79.

29. In a way, this is like the difference between endorsing a check "pay Carl Schneider" (nontransferable) as opposed to "pay to the order of Carl Schneider" (transferable). In the first instance, only Carl gets the money. In the second, he may delegate the money to whomever he wishes. Although after divorce you are free to love another and begin a new life with someone else (a new hypothetical contract), as anyone dealing with divorced or divorcing people knows, not only financial resources but emotions are enmeshed.

30. Brinig, *Status, Contract and Covenant*, *supra* note 23, at 1601. I think of this continuing search as "hedging."

31. *See id.* at 1574–76. For a lengthy discussion using the terminology of status rather than covenant, see REGAN, *supra* note 16, 35–42. *See also* William J. Everett, *Contract and Covenant in Human Community*, 36 EMORY L.J. 557, 565–68 (1987) (discussing covenants between parents regarding parenthood). For discussions of partnership in the context of dissolution, see Bea A. Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 689–98 (1990), and Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Disassociation Under No-Fault*, 60 U. CHI. L. REV. 67, 108–29 (1993).

32. *See* Brinig, *Status, Contract and Covenant*, *supra* note 23, at 1597–99.

33. When a married couple divorces, important vestiges still remain. These may be ephemera, like photographs or ticket stubs. They may be remembrances as momentous as shared joys at children's triumphs or mutual sorrows at the death of a family friend or beloved pet. The remains may include continued responsibilities for co-parenting, the financial ties of joint business undertakings or responsibilities for retiring long-term debts. I leave a fuller description for another day.

*Give not to son or wife, brother or friend, power over thee while thou livest; and give not thy estate to another, lest thou repent, and entreat for the same. . . . In all thy works keep the pre-eminence. . . . In the time when thou shall end the days of thy life, and in the time of thy decease, distribute thy inheritance.*³⁴

This paper describes in some detail the vestiges remaining after the legal ties of infancy and parental responsibility disappear. Some of the bonds between parent and adult child undoubtedly are primordial and emotional and, therefore, unlikely to alter with years and fortunes. Whether the siblings maintain that sort of relationship with each other on their own, or vis à vis their parents, depends to some extent upon whether the parents are viewed as a net good, in which case the "franchise model" operates. In the case where the parents are seen as a net neutral or bad, a "state of nature" governs.³⁵ Of at least passing interest to this conference, law makes a critical difference in what is chosen—the franchise or the largely unenforceable agreements of the state of nature. Law will also certainly be involved where family governance of whatever sort fails: there may be elder abuse, estate problems, suits to enforce statutory duties of support, quarrels over competency, and the increasingly popular disputes over grandparent visitation.

Although I have proposed two models for describing the behavior of what might be described as mature families (or related adults), the appropriate model depends in part upon the parent's health, cheerfulness, and mental youthfulness. It will also hinge on whether the parent's estate is seen as large, small, or negative. Thus, there may be a shift between paradigms as the parent ages or his or her fortune changes. Siblings may act as franchisees during their forties and their parents' late sixties, and then as sovereign nations (perhaps warring ones) during their own late fifties and their parents' eighties, as the parents become less pleasant to deal with or the bond market crashes. On the other hand, the siblings

34. *Sirach* 33:30-24 (New American Bible).

35. The "state of nature" is Anthony Kronman's borrowing from THOMAS HOBBS, *LEVIATHAN* (C.B. MacPherson ed., Penguin Books 1982) (1651). See Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J.L., ECON. & ORGANIZATION 5, 6 (1985).

The institution of franchise itself may be seen, from the perspective of franchisees, as a tamer sort of sovereign nation model. Although other franchises may be competitors (I have two Exxon stations and two 7-11 stores within six blocks of each other on the commercial street nearest my home), their rivalry is more friendly than that with competing brands. The commonness outweighs the competitive instinct. By protecting the transactions with the franchisor, the law encourages referrals and other sharing among the franchisees.

may begin as "independent nations" and end up as franchisees if their parents win the lottery or if being supportive otherwise becomes more attractive.

Moreover, the choice of models is skewed because, in some respects, it is "natural" for adults to forget that they remain children. From the parents' point of view there may still be hope of enforcing the implicit contract made when the child was young—"I will take care of you, love you, invest in you, and in return be cared for by you when I am enfeebled."³⁶ The adult child may act badly because he or she has the opportunity for gaining what economists call quasi rents³⁷ and because the big parental investment was all made and the parent's love built in the child's youth, without his or her explicit concurrence.³⁸ "I never agreed to have you live with me, and I have a life of my own" may be the child's response to the parent's incapacity. The adult child may therefore think of self and siblings as individuals in isolation from each other and from their parents.

Perhaps there is a distance that is the optimum distance for seeing one's father, farther than across the supper table or across the room, somewhere in the middle distance: he is dwarfed by trees or the sweep of a hill, but his features are still visible, his body language still distinct. Well, that is a distance I never found. He was never dwarfed by the landscape—the fields, the buildings, the white pine windbreak were as much my father as if he had grown them and

36. This implicit contract is the subject of Brinig, *supra* note 26, at 1. See also JOHN LOCKE, *of Parental Power*, in SECOND TREATISE ON GOVERNMENT § 67 (Gateway 1964) (1690).

The subjection of a minor places in the father a temporary government, which terminates with the minority of the child; and the honour due from a child places in the parents a perpetual right to respect, reverence, support, and compliance too, more or less, as the father's care, cost, and kindness in his education has been more or less. This ends not with minority, but holds in all parts and conditions of a man's life.

Id.

37. A quasi rent is income that is not earned, but extracted from the contracting partner's "consumer surplus," the amount of satisfaction gained from the transaction in excess of the price paid or opportunity foregone. For a discussion of quasi rents in the context of marriage and divorce, see Lloyd Cohen, *Marriage, Divorce and Quasi Rents; Or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 287-303 (1987). The idea of quasi rents in this context is that the child may comfortably rely on the fact that the parent is extremely committed to him or her and may therefore misbehave quite substantially or for a long time before the parent will publicly complain.

38. As Richard Epstein noted, "Democratic processes with universal suffrage [sic] cannot register the preferences of the unborn, and dialogue between generations is frustrated when future generations, or at least some future generations, are of necessity silent." *Justice Across the Generations*, 67 TEX. L. REV. 1465, 1465 (1989).

*shed them like a husk.*³⁹

Both models of describing the mature family are, therefore, worth considering, and we can influence which one dominates by our choice of law.

II. ADULT CHILDREN AS SOVEREIGN NATIONS: THE STATE OF NATURE

*In commercial countries, where the authority of law is always perfectly sufficient to protect the meanest man in the state, the descendants of the same family, having no such motive for keeping together, naturally separate and disperse, as interest or inclination may direct. They soon cease to be of importance to one another . . .*⁴⁰

Students of human nature, at least since the time of John Locke, have seen the obvious parallels between the associations of adult children and their elderly parents and those of unrelated citizens and communities.⁴¹ Locke, in his *Second Treatise on Government*, describes extended families residing together under the father's guidance or "rule" through their own consent, that is, through their new and voluntary contract.⁴² Without such an agreement, the former infants are at liberty to govern themselves, or to unite at will with other societies or communities.⁴³ The relationship with their extended family is thus in many ways similar to the relationship between sovereign nations.

If we consider the sovereign nation model as the political scientist does, what do we see? Many of the problems between nations depend upon whether their dealings can be characterized as revealing credibility and trust or miscalculation and betrayal.⁴⁴ Groups who have committed great crimes, like the Russians under Stalin, are seen as being more difficult to bargain with, not only because

39. SMILEY, *supra* note 1, at 20.

40. ADAM SMITH, *Of the Order in Which Individuals Are Recommended by Nature to Our Care and Attention*, in *THEORY OF MORAL SENTIMENTS*, 359, 365 (Clarendon Press 1976) (1822).

41. For a most helpful discussion of enforcement in these circumstances, see Kronman, *supra* note 35, at 24-30.

42. John Locke, *SECOND TREATISE ON GOVERNMENT*, §§ 95-122 et seq. (Gateway 1964) (1690).

43. *Id.* § 119. Locke is setting up his argument for a popular government, as opposed to Sir Robert Filmer's patriarchal monarchy. See *id.* §§ 90-91 & n.2, § 101 & nn.35-38.

44. For classic works, see ROBERT JERVIS, *PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS*, (1976), and Robert Jervis, *Hypothesis on Misperception, in THE WAR SYSTEM: AN INTERDISCIPLINARY APPROACH* 465 (Richard A. Falk & Samuel S. Kim eds., 1980).

they are dangerous, but also because they are untrustworthy. The choice of whether to trust depends at least to some extent upon whether countries retell their joint histories in similar ways.⁴⁵ Yet even when they do, allies should never really be trusted, because one's nation is not a "philanthropic" institution charged with absorbing the losses caused by another country's change of heart or mind. Characterizing another regime as "evil" may cause the revision of history itself. Thus the Germans rewrote interpretations of their prior dealings with the British during the military expansion before World War II. And once a country takes a stand by revising history, the protagonists believe in their new "truth" because it has been stated so long that the speakers (or writers) begin to believe it. The nation's credibility is therefore engaged with the winning argument as much as its allies. Further, when the debate reaches an international audience, the exchange of views may itself destroy truth, since the citizenry continues to hear its own government's version.⁴⁶ In the game-theory terminology popular for describing international negotiation,⁴⁷ the equilibrium model becomes tit-for-tat or, as it is sometimes called, reciprocity.⁴⁸

With the family, the paradigm developed so far would be al-

45. See, e.g., E.H. DANCE, *HISTORY THE BETRAYER* 41-48 (1975) (noting typical response when countries' histories conflict: "We like to think that we are right and that our opponents are wrong . . ."); Stephen Van Evera, *Hypotheses on Nationalism and War*, 18 INT'L SECURITY 5, 26 (1994) ("Nations can co-exist easily . . . when they share a common image of their mutual history.").

46. This was undoubtedly part of Voice of America's mission and part of the reason the end of the Cold War corresponded with the triumph of the Information Age, when the tanks driving down Moscow's main streets were reported to the world over the Internet even as they moved. Edward J. Valaushas, *On the Nets and on the Streets: A First-Person Report of the Soviet Coup*, 16 ONLINE 41, 42 (1992).

47. See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 1 (1960).

48. Tit-for-tat means that the subject nation's behavior will be contingent on that of the other nation's, with an initial peaceful attitude. See, e.g., Thomas C. Schelling, *An Essay on Bargaining*, 46 AM. ECON. REV. 281, 299-301 (1956) ("Each party must be confident that the other will not jeopardize future opportunities by destroying trust at the outset."). If the other nation behaves belligerently, so will the subject nation. Reciprocity similarly involves the converse of a "golden rule" philosophy; that is, do whatever the other participant has done to you. See, e.g., ROBERT M. AXELROD, *THE EVOLUTION OF COOPERATION* 21 (1984) (discussing how WWI soldiers violated commands to achieve cooperation from the opposing side). For game-theoretic discussions, see *id.* at 124-41 (discussing how to promote cooperation in various systems); Brinig, *Status, Contract and Covenant*, *supra* note 23, at 1592 (discussing behavior-changing recognition of status in marriage); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 36 (1991) (discussing settlement tactics versus traditional adversarial legal tactics). For a readable general discussion of game theory, including various solutions and strategies, see ERIC RASMUSEN, *GAMES AND INFORMATION passim* (1989).

most pathological. Parents and siblings would attempt to look out for their own interests rather than for the family's as a whole. They would think in short- rather than long-range terms, and misunderstandings and intolerance would abound, as they did in Smiley's *Thousand Acres*.⁴⁹ Thankfully, this is not the prevalent pattern.

How does this unhappy situation, with its frequent escalation and conflict, improve, if it ever does? In the ordinary contract without enforceability, Thomas Hobbes sees a hopeless situation:

For he that performeth first, has no assurance the other will performe after; because the bonds of words are too weak to bridle mens ambition, avarice, anger, and other Passions, without the fear of some coercive Power; which in the condition of meer Nature, where all men are equall, and judges of the justnesse of their own fears cannot possibly be supposed. And therefore he which performeth first, does but betraye himselfe to his enemy; contrary to the Right (he can never abandon) of defending his life, and means of living.⁵⁰

Beginning with this quotation from Hobbes, Anthony Kronman has written that informal mechanisms—hostage taking, collateral, union, and hands-tying—might be used to channel conduct⁵¹ in situations in which individuals and groups must “arrange their transactions . . . without the aid of an independent enforcement mechanism whose powers are significantly greater than their own.”⁵² Hostage taking has attracted international attention not only when inmates take prisoners, but also when international provocateurs, like those in Lebanon or, more recently, Bosnia, detain innocent citizens of another nation. The idea is that the other side will be willing to deal, or at least refrain from attacking, if people (or goods) that they value are held as negotiating devices.⁵³

49. See SMILEY, *supra* note 1.

50. HOBBS, *supra* note 35, at 196.

51. For a more recent study of these extralegal sanctions, see David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 392–97 (1990). The classic article in this area is Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 62–63 (1963). SMITH, *supra* note 40, at 366, notes that among well-disposed people, the necessity or convenience of mutual accommodation very frequently produces a friendship not unlike that which takes place among those who are born to live in the same family.

Colleagues in office and partners in trade call each other brothers and frequently feel towards one another as if they really were so. Their good agreement is an advantage to all; and, if they are tolerably reasonable people, they are naturally disposed to agree. We expect that they should do so, and their disagreement is a sort of small scandal.

Id.

52. Kronman, *supra* note 35, at 9.

53. *Id.* at 12–14. As Kronman explains, “Hostage-giving is, in fact, simply a

Kronman defines collateral as something, held by one side (or a third party) as a guarantee or pledge of performance by the other (or both), that has value on the open market.⁵⁴ In the international setting, an example is the International Monetary Fund, in which many nations invest. In the family, an instance of collateral is the diamond engagement ring that bonds the affianced and belongs to the nonbreaching party if the marriage promise is breached.⁵⁵ Union is described by Kronman as the building of a shared affection⁵⁶ (or, as the political scientist would put it, a shared history). This can be done with unrelated groups, such as nations, through emphasis on common characteristics, like Aryanism, or fear of another nation, or through "cheerleading," like school songs or bumper stickers. The most famous (and literal) example of hands-tying behavior⁵⁷ is Ulysses's binding himself to the mast.⁵⁸ Economists exam-

means for achieving a simultaneity that would otherwise be unattainable; the hostage acts as a bridge between two temporally distant moments of performance and brings them into an artificial union with one another." *Id.* at 13. The power of the hostage taker "can only be realized by means of threat and cajolery and therefore requires our continued interaction following breach." *Id.* at 16.

54. Kronman, *supra* note 35, at 16.

I now hold something that is of value to me, because either it gives me pleasure or it can be exchanged for something else that I want. To be sure, the goblet is of value to you, too, but that is not what I care about. What matters to me is that I now have an asset which is a direct substitute for the performance you have promised, an asset whose value I can realize through use or trade and (most important) without having to deal with you at all

Id.

55. For a longer description of this custom, and the reasons for it, see Brinig, *Rings and Promises*, *supra* note 22, at 204-13.

56. "The parties to an exchange in the state of nature can therefore reduce the risk of opportunism by taking steps to increase the likelihood that each will see his own self-interest as being internally connected to the welfare of the other." Kronman, *supra* note 35, at 20. Union "seeks to reduce divergence and competition by encouraging the parties to develop sympathy, affection, or love for one another." *Id.* at 21.

57. Kronman defined hands-tying behavior as "actions that make a promise more credible by putting it out of the promisor's power to breach without incurring costs he could otherwise have avoided." *Id.* at 18. Kronman uses the example of declaring one's commitment in a public place, in the presence of neighbors assembled for the occasion. This substantially increases the harm that would be done to one's reputation upon breach. *Id.* at 18-19 (citing Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615, 615-16 (1981)).

58. The myth is explored in psychological terms in JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 37-47 (1984). See also Thomas C. Schelling, *Enforcing Rules on Oneself*, 1 J.L., ECON. & ORGANIZATION 357, 361 (1985) ("Acting in accordance with his *current* preferences for that *future* occasion, he attempts to bind his behavior against those preferences that may be then governing."). In the context of marriage, see Elizabeth S. Scott, *Rational*

ine such hands-tying precommitments in situations where actors invest in transaction-specific capital: for example, when a railroad invests in a spur that can only lead to one mine and a mining company invests heavily in equipment useful only at one particular site.⁵⁹ Both parties' hands are tied so they cannot rationally act uncooperatively.

This state-of-nature model helps explain family institutions like reunions, Christmas giving to and by extended relatives, visiting cousins when one is in town, and even the custom of retaining the family name when one becomes an adult, all of which are "union-building" devices. Retaining the family name made particular sense—it was easy to recognize who was the landowner and who was the blacksmith from one's surname. Therefore, family names established one's reputation.⁶⁰ We have weakened this kind of identification in the modern concept of retaining maiden names or adopting new surnames when we marry or have children.⁶¹ Hostage taking is more difficult to see in the family context because it presumes that the hostage is valued by one side but not the other,⁶² yet siblings usually value the same things.⁶³ If the elderly

Decisionmaking About Marriage and Divorce, 76 VA. L. REV. 9, 38-93 (1990). A literal example is the Irish ballad of Johnny Sands (taught to me by my mother, who learned it from her grandmother):

A man whose name was Johnny Sands / was wed to Betty Hayes. / He thought with her in peace and quiet / to spend the rest of his days. / But oh, she was a scolding wife, / full of caprice and whim; / He said that he was tired of life, / and She was tired of him. / "Then I will go and drown myself— / the river runs below." "Pray do, you silly elf, / I wished that long ago." "For fear that I should courage lack, / and try to save my life, Pray tie my hands behind my back." "I will, replied his wife." So down the hill the loving wife / then came with all her force / to push him in; he stepped aside / and she fell in of course. / Splashing, dashing like a fish / "Oh save me, Johnny Sands!" / "I can't, my dear, though much I wish / For you have tied my hands!"

59. Cf. John Umbeck, *A Theory of Contract Choice and the California Gold Rush*, 20 J.L. & ECON. 421, 428-34 (1978) (recounting how gold-mining industry avoided hands-tying behavior through cooperation among themselves). In the context of trusts and estates, see, e.g., Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 51-54 (1992) (discussing options for limiting effects of posthumous control through wills). For a description of specific investments by spouses, see Cohen, *supra* note 37, at 267-68. Specific investments cause the damage to follow breach automatically, or nearly so. Kronman, *supra* note 35, at 19.

60. Yoram Ben-Porath, *The F-Connection: Family, Friends, Firms and the Organization of Exchange*, 6 POPULATION & DEV. REV. 1, 11 & n.6 (1980).

61. See, e.g., *Lassiter-Geers v. Reichenbach*, 492 A.2d 303, 306-07 (Md. 1985) (holding that best interest of child was to assume father's surname); *Stuart v. Board of Supervisors*, 295 A.2d 223, 224-27 (Md. 1972) (holding that election board could not cancel a voter's registration because she used her maiden surname).

62. However, the "process of [spouses'] identification is consummated in the pro-

parent has property the younger generation wants, the estate then acts as collateral to induce the young to do what pleases the older people.⁶⁴ Perhaps the absence of any such bond between adult siblings is the reason these relationships tend to be weaker,⁶⁵ becoming intensely competitive as the elderly parents near death. At the same time the competition for the scarce parental resources grows, other things that would bind the siblings together are fading.⁶⁶ The memory of a childhood spent happily playing together may be faint, especially in the reality of dealing with a cantankerous and sickly senior.⁶⁷

creation and rearing of children who . . . strengthen their parents' union, by giving it an 'objective' or 'external' form." Kronman, *supra* note 35, at 21. Rearing children can also be a form of mutual hostage taking. *Id.*

63. However, in my father's current will he has made specific devises to me and my brother that mean nothing to the devisee and a great deal to the other sibling. This has encouraged us to remain good friends so that each can be sure of receiving the valued property some years down the line.

64. See James M. Buchanan, *Rent Seeking, Noncompensated Transfers, and Laws of Succession*, 26 J.L. & ECON. 71, 74-79 (1983). Buchanan argues that this currying of favor may not be what the elderly parent wants. *Id.* at 77. Another view is that the parent wants good behavior to actually be spontaneous and any gift to be a gift, not something earned.

65. For a fascinating modern study of a family at this stage, see SMILEY, *supra* note 1, at 305-30.

66. However, Ted Bergstrom, On the Evolution of Altruistic Ethical Rules for Siblings 20-30 (1995) (unpublished working paper, University of Michigan, on file with author), maintains that siblings still have incentives to cooperate because they possess common genes.

67. Women more than men tend to care for elderly parents. See, e.g., Lee Smith, *What Do We Owe to the Elderly?*, FORTUNE, Mar. 27, 1989, at 54, 58 ("Both Christianity and Judaism make it plain that a child's responsibility to a parent is fundamental, maybe even greater than his duty to his offspring Carrying out the Fourth Commandment generally falls to middle-aged daughters and other female relatives."); Nora Underwood, *Mid-Life Panic, Thousands of Canadians Are Caught Between Children and Elderly Parents*, MACLEAN'S, Aug. 19, 1991, at 30, 32 ("You have a situation now in which you have adults, particularly women, caring for their children at a time when their own parents are likely to need help.") (quotation omitted); see also Merrill Silverstein, *Stability and Change in Temporal Distance Between the Elderly and Their Children*, 32 DEMOGRAPHY 29, 34-43 (1995) (asserting gender was positive but not significant factor in whether child would care for elderly parent). Adult children have their own families competing for their attention at the same time. See Herbert S. Donow, *Am I My Father's Keeper? Sons as Caregivers*, 31 GERONTOLOGIST 709, 709-10 (1991); Christine L. Himes, *Future Caregivers: Projected Family Structures of Older Persons*, 47 J. GERONTOLOGY 17, 24 (1992); Beverly Horsbaugh, *Redefining the Family: Recognizing the Altruistic Caregiver and the Importance of Relational Needs*, 25 U. MICH. J.L. REF. 423, 470 (1992); Marshall B. Kapp, *Elder Law: Who's the Parent Here? The Family's Impact on the Autonomy of Older Persons*, 41 EMORY L.J. 773, 783-84 (1992).

As the narrator, Ginny, reflects in *A Thousand Acres*:

Of course, fault had nothing to do with it, and I got over my jealousy then by reminding myself over and over, with a kind of litany of the central fact of my life—no day of my remembered life was without Rose. Compared to our sisterhood, every other relationship was marked by some sort of absence . . . We've always known families in Zebulon County that live together for years without speaking, for whom a historic dispute over land or money burns so hot that it engulfs every other subject, every other point of relationship or affection. I didn't want that, I wanted that least of all, so I got over my jealousy and made my relationship with Rose better than ever.⁶⁸

The siblings may now see in each other the traits they most disliked in their parents, indecisiveness, greed, and intolerance,⁶⁹ especially if they are reminded of these characteristics by the elderly parents themselves.⁷⁰ In families without a great deal of wealth to pass on or where the elderly person is senile, this model also may explain certain types of hands-tying behavior: moving far away from the family home so as not to have too many visits from the aged parent or to avoid uncomfortable decisions like the question of moving the parent to a nursing home.⁷¹ On the other extreme, the behavior may be building the apartment addition that will only be useful for the in-law to occupy.

68. SMILEY, *supra* note 1, at 8.

69. See SMILEY, *supra* note 1, at 6-13; see also *supra* note 6 (discussing character traits of daughters in *A Thousand Acres*).

70. See RICHARD POSNER, *AGING AND OLD AGE* 99-100 (1995). Posner quotes T.S. Eliot, who writes in "East Coker," in *Four Quartets*: "Do not let me hear / Of the wisdom of old men, but rather of their folly, / Their fear of fear and frenzy, their fear of possession, / Of belonging to another, or to others, or to God."

71. Cf. Silverstein, *supra* note 67, at 35 (giving results of controlled-group study where 31% of parents lived further from their children after a four-year span, but attributing this to parents moving).

In Jane Smiley's *A Thousand Acres*, the youngest daughter, Caroline (the parallel to Shakespeare's Cordelia), moves away and gains distance from the family and the farm. The distinction between the sisters is portrayed by Ginny, the middle daughter, speaking of the family rituals of apologizing to their father:

For all her remarks and eye rolling, Rose could perform her part, and after the fact, could even get our father to laugh about some things. Caroline, though, was perennially innocent, or stubborn, or maybe just plain dumb about this sort of thing. She was always looking for the rights and wrongs of every argument, trying to figure out who should apologize for what, who should go first, what the exact working of an apology should be.

SMILEY, *supra* note 1, at 3.

III. FRANCHISE: THE TIES OF SHARED INVESTMENT

As I have now mentioned several times, there is an alternative way of looking at the same relationships. At least some elements of these extended families are like franchise arrangements: the older person is the franchisor, with reputational stakes⁷² as well as "up front" investment in the middle-aged generation.⁷³ The adult children are franchisees, who have reaped the benefit of their parents' educational and other investment in them, and who now actively operate their own family units with the name, the reputation, and possibly the fortune of their parents at risk. As Ginny's husband observes, "Well, I think one of [your father's secrets] is that he's afraid of his daughters." Ginny replies, "What has he got to fear? He's got everyone on this place under his thumb."⁷⁴

The law-and-economics view of franchising is that it exists as an alternative to company-owned businesses to save on the costs of making repeat transactions.⁷⁵ The franchisor wishes to continue

72. In much of the game-theoretic literature, reputation serves as a discipline among market participants, as the promisor attempts to develop and retain a name for reliability. *E.g.*, Charny, *supra* note 51, at 393; Klein & Leffler, *supra* note 57, at 615-16 (1981); Carl Shapiro, *Premiums for High Quality Products as Returns to Reputations*, 98 Q.J. ECON. 659, 662-66 (1983); L.G. Telser, *A Theory of Self-Enforcing Agreements*, 53 J. BUS. 27, 35-36 (1980).

Ben-Porath notes, "Authority, discipline, altruism, and family solidarity affect the value of the signal, family affiliation, for the rest of the world. The presence of a head of family, serving as director for communication, trust, and redistribution, reduces transaction costs within the family by reducing the need for bilateral relationships." Ben-Porath, *supra* note 60, at 12.

73. *See, e.g.*, Ben-Porath, *supra* note 60, at 3 ("Parental decisions to have children and how to behave toward them in infancy and early childhood are unilateral but are probably affected by expectations concerning future mutual relationships."). Ben-Porath mentions that "large outstanding balances are tolerated," and "enforcement is mostly internal." *Id.* at 4. The investments are specific because they are "embedded in the identity of the partners, without which" they lose their meaning, and "thus [are] specific and nonnegotiable or nontransferable." *Id.*

74. SMILEY, *supra* note 1, at 103.

75. Transaction costs, as these are called, are the economist's equivalent of friction. They usually include the time expended in reaching agreement, attorney's fees, and the paper and secretarial effort required to produce a contract. If the contract requires legal enforcement later, all of these costs are greatly magnified and added to court costs. The classic work on transaction costs is R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937). Emphasis on these frictions is one of the differences between the "Chicago school" and the "new institutional" economists. *See, e.g.*, OLIVER WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS AND RELATIONAL CONTRACTING* (1985); Richard N. Langlois, *The New Institutional Economics: An Introductory Essay*, in *ECONOMICS AS A PROCESS* 1, 2-5 (Richard N. Langlois ed., 1986) (outlining distinction between old and new institutionalism). For a complete discussion in the context of franchising, see Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 *STAN. L. REV.* 927,

the firm's reputation for quality and price and therefore will allow the franchisee the benefit of any firm innovations or trade secrets, as well as the necessary tools and supplies (usually given at a substantial discount), and, most valuable, use of the firm name.⁷⁶ In return, the franchisee is supposed to keep the establishment in at least the condition necessary to maintain the unsullied name of the franchisor.⁷⁷ To enforce such promises, franchises typically require a series of determinate contracts that provide opportunities for interim monitoring and specify the quality of goods sold as well as inputs for the concern.⁷⁸ Meanwhile, the franchisee usually is concerned about opportunism by the franchisor, who may increase input prices or impose additional costs upon the franchisee once the contract term begins.⁷⁹

The family metaphor has not been lost on industry commentators who stress the human relationships involved in franchising: "Being a franchisor is pretty much like being a parent. If there's a squabble amongst the kids you try to get in there and solve it. You have to handle it with diplomacy."⁸⁰ And, illustrating the inequality that is the hallmark of the franchise business relationship, "[h]is [the franchisee's] responsibility to you is to perform like you say to."⁸¹

965-70 (1990). Ben-Porath notes that "[i]nvestment in resources specific to a relationship between identified parties can save transaction costs and stimulate trade." Ben-Porath, *supra* note 60, at 1. He calls this investment "specialization by identity," and notes that the "family is the locale of transactions in which identity dominates." *Id.*

76. Hadfield, *supra* note 75, at 931-32.

77. As Hadfield notes,

A franchisee is inclined to make decisions about how much effort to put into the business based on the profits that will accrue directly to her in her own outlet. She is not inclined to take into account that, because customers will make judgments about the quality of the entire franchise system based on their experience at an outlet, cost-saving reductions in quality at her outlet will affect the overall value of the trademark and thus the profits of other franchisees and the franchisor.

Id. at 949. Such free riding, Hadfield notes, is an example of the principal-agent problem in the economics literature. *Id.* at 950; see also Robert S. Pyndyck & Daniel L. Rubinfeld, MICROECONOMICS 617-36 (1989) (discussing agency relationships in markets).

In casual observations on my infrequent trips to the hairdresser, hardly the basis for an empirical work, the accomplishments of one's children seems to be the most common topic of conversation between elderly patrons. Movies which also illustrate this point are STEEL MAGNOLIAS (Tri-Star 1989) and ON GOLDEN POND (Twentieth Century Fox 1981).

78. Hadfield, *supra* note 75, at 931-38.

79. Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 297-302 (1978).

80. HARRY KURSCH, THE FRANCHISE BOOM 119 (rev. ed., 1968).

81. JOHN J. HOOKER, THE STORY OF MINNIE PEARL—A CASE HISTORY OF ONE

When you sell the franchise, the franchisee is buying your leadership. You are not buying his. The function of the franchisee is to follow the wisdom and system of the franchisor . . . [T]ell him, 'Look, partner, we are both playing a role, and the role I've got is the Daddy, and the role you've got is the son, and I'm going to tell you how to do it. If you do it right we're doing to do it better.'⁸²

Like the franchisor, the elderly parent has a large and specific investment in the family name as well as in the children he or she has raised.⁸³ The parent does not usually terminate the relationship. Although there may be threats of disinheritance, these usually will not be credible.⁸⁴ However, the parent may well prefer or even insist on frequent monitoring. This serves two functions. First, the parent may actually desire the contact with the child.⁸⁵ In addition to maternal or paternal affection, she or he may genuinely value the child as a friend. The parent may also be lonely, and one's children may be better company than are other elderly people, especially when friends begin to die off. Finally (and this is related to the franchise agreement), the parent may be monitoring the child's activities to make sure that the family tradition, whatever it is, is being carried on.⁸⁶ Of course, keeping in touch with one's children

NEW COMPANY'S TRIALS, TRIBULATIONS AND TRIUMPHS IN FRANCHISING TODAY: REPORT ON THE FIFTH INTERNATIONAL MANAGEMENT CONFERENCE ON FRANCHISING 176 (C. Vaughn ed., 1970).

82. *Id.*

83. Ginny, the middle child in Smiley's retelling of *King Lear*, speaks of her father as the "biggest farmer," framing "the right order of things." SMILEY, *supra* note 1, at 20. "Trying to understand him," she says, was like "listening to the minister marshal the evidence for God's goodness." *Id.* In the end, "the reality was incomprehensible, and furthermore the failure of our understandings was the greatest proof of all, not of goodness or omniscience or whatever the subject of the day was, but of power." *Id.*

84. The parent does not normally want to injure any of the children, but rather to change the recalcitrant's behavior. The most familiar example of such a parent is the father in the parable of the Prodigal Son. *Luke* 15:11-32. However, the youngest daughter is disinherited in both *King Lear* and *A Thousand Acres*. Smiley, *supra* note 1, at 21.

85. For example, Marshall Kapp writes:

[P]eople live their lives embedded within various relationships, among which the family for most of us is paramount. Since these relationships tend to grow stronger over time, they take on added significance for most older persons. These relationships have an empowering quality contributing to the older person's potential for positive, affirmative autonomy to think and act, as opposed to the simple, negative autonomy to be left alone.

Kapp, *supra* note 67, at 782.

86. Thus it was the older generation who wished to continue Old World languages, as in *Meyer v. Nebraska*, 262 U.S. 390, 399-402 (1923), and in more modern California and Quebec. It may be the elderly who move for extreme pluralism, as in the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1934 (1994) (expressing strong pref-

was simple in the era when many parents did not live long and when those who did were likely to own the farm their children worked or even the home the children lived in.⁸⁷ As we have moved away from our ancestral homes and off to faraway parts of the country or world, we distance ourselves from our parents and make monitoring more difficult. We are also less likely to support them, given Social Security, Medicare, and pensions.⁸⁸

For the children (the franchisees), the relationships are complex. Children sometimes vie not to support their parents. They compete in rivalries about which grandchildren are most successful,⁸⁹ whose job is the best, and who has best maintained family traditions. Yet they still care about their brothers or sisters.⁹⁰ And they have a common interest in maintaining the family name and perhaps in keeping the family property intact.⁹¹ For example, in

erence for placing American-Indian children in need of homes with other American-Indian families and through American-Indian courts), and the racial preference for adoption statutes. *See, e.g.*, ARK. CODE ANN. § 9-9-102 (Michie Supp. 1995) (citing factors for adopting racial-minority child); CAL. FAMILY CODE § 8709 (West Supp. 1995) (considering race as factor for child's best interests); MINN. STAT. ANN. § 259.29 (West Supp. 1996) (requiring race consideration in adoption placements).

87. *See SMILEY, supra* note 1, at 266 ("The kind of life people lead in this country is getting rarer and rarer. . . . Some of my best memories are of making hay with my grandfather when my uncles were young men. They worked like one body, they were that close.").

88. The corollary, of course, is that parents will not be as interested in supporting the children when they are young. As Ben-Porath explains, "The confidence of each party in the degree to which he and his trading partners will go on being tied together influences the amount of their investment commitment and the gains." Ben-Porath, *supra* note 60, at 6. For a discussion of this reduction in investment, see Brinig, *infra* note 124, at 302-12.

89. Note the jealousy of the elder son in the story of the Prodigal Son. The elder son is angry at his younger brother for engaging in loose living and returning to be rewarded. Meanwhile, the father has never acknowledged the elder son, who has always followed his father's rules. The elder son is even more angry at his father for what he sees as his father having ignored his own good traits while favoring the younger, prodigal, brother. *Luke* 15:25-32.

90. Hence the phrase "blood is thicker than water." *See Kronman, supra* note 35, at 21-22 & nn.12-13 (arguing that "solidarity of household community" eventually replaces distrust inherent among siblings). But note that occasionally children vie not to sacrifice for each other. *Hale v. State*, 408 A.2d 772, 773-74 (Md. Ct. Spec. App. 1979) (involving siblings who enlisted the state's help in their efforts to equalize payments for their elderly and indigent parent); *see, e.g.*, *Pecinski v. Pecinski*, 226 N.W.2d 180, 180-81 (Wis. 1975) (holding that siblings whose extenuating circumstances prevented them from donating kidney to dying sister could not make their incompetent brother donate his kidney instead).

91. Economist Ted Bergstrom suggests another possible communality as well. Bergstrom, *supra* note 66, at 22-23. In a combination of game theory and evolutionary biology, Bergstrom explains why siblings are apt to cooperate at least twice as much as nonrelated people to assure at least half of their genes survive. *Id.*

King Lear, one of the Duke of Gloucester's sons is asked: "What are you? / Your name, your quality, and why you answer / This present summons?" Edgar replies, "Know my name is lost; / By treason's tooth bare-gnawn and canker-bit: / Yet am I noble as the adversary / I come to cope."⁹² This emphasis upon physical property would be more apparent in rural communities, as it was during continental feudalism.⁹³ What may be more important now, as John Langbein argues, is human capital.⁹⁴ Our parents invested in our human capital when we were young,⁹⁵ and, as adults, we now have the opportunity to profit from their investment. Whether we choose to repay our parents for their investment will depend in part upon nonfinancial considerations: love, guilt, and generalized emotional intermeshings.⁹⁶ It also will depend on coercive intervention through state requirements such as legislation mandating support of the elderly or prohibiting elder abuse.⁹⁷ Finally, whether children repay their parents will depend upon whether the unpleasant, short-term burdens of caring for the older person outweigh the

92. WILLIAM SHAKESPEARE, *KING LEAR* act 5, sc. 3, lns. 120-124 (John D. Wilson ed., Cambridge Univ. Press 1984).

93. See Ben-Porath, *supra* note 60, at 16

The supply of labor services by children is thus linked to the transfer-insurance-bequests nexus. The particular form in which parents hold wealth (and in which children accumulate their own) has implications for the demand of parents and children for each other, and the particular choice of assets is affected by returns that reflect both transactional and nontransactional considerations.

Id.

94. John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 729-39 (1988).

95. David Hume, *Of Polygamy and Divorces*, in *ESSAYS MORAL, POLITICAL AND LITERARY* 181, (Eugene F. Miller ed., Liberty Classics 1987) (1777). In begetting children, he is bound, by the ties of nature and humanity, to provide for their subsistence and education. When he has performed these two parts of duty, no one can reproach him with injustice or injury. See also the more ancient version: "What father among you will give his son a snake if he asks for a fish, or hand him a scorpion if he asks for an egg? If you, with all your sins, know how to give your children good things . . ." *Luke* 11:12-13.

96. See Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 J. POL. ECON. 385, 392-401 (1993). The use of shame, guilt, and loss of self-esteem in modern industrial society are the subjects of a number of articles. See J. David Lewis & Andrew Weingert, *Trust as a Social Reality*, 63 SOC. FORCES 967, 968-74 (1985); Robert L. Sutton & Anita L. Callahan, *The Stigma of Bankruptcy: Spoiled Organizational Image and Its Management*, 30 ACAD. MGMT. J. 405, 412-22 (1987). The use of these emotions is also the subject of nineteenth-century novels. See, e.g., GEORGE ELIOT, *MIDDLEMARCH* (David Carroll ed., Oxford Univ. Press 1986) (1871); WILLIAM D. HOWELLS, *THE RISE OF SILAS LAPHAM* (1912).

97. See, e.g., Stephen Crystal, *Social Policy and Elder Abuse*, in *ELDER ABUSE: CONFLICT IN THE FAMILY* 331, 336-39 (Karl A. Pillemer & Rosalie S. Wolfe eds., 1986) (criticizing various aspects of elder-abuse legislation).

longer-term benefits, either in memory or inheritance.

The child may also be concerned that, like the franchisor, the elderly parent may "up the ante" by requiring an increasingly onerous performance. This could take the form of whining, complaints about physical ailments, or demands for attention that point up the competition among siblings. To some extent, the escalation is inevitable given the deteriorating health of the parent.⁹⁸ The franchisee-child then faces the problem, like the parent of an infant faced with an onslaught of crying, of differentiating the parent's selfish behavior from his or her genuine concerns.

Why are elderly parents more concerned with the long-range benefit of the family's reputation than are their adult children?⁹⁹ The answer lies in the concept of wasting assets.¹⁰⁰ If adults are

98. The English "poor laws," enacted in 1601, provided that relatives were to be the primary source of support for the elderly, and community provision was to be the last resort. David Thomson, *I Am Not My Father's Keeper: Families and the Elderly in Nineteenth Century England*, 2 L. & HIST. REV. 265, 266 (1984). This remained the essential legal position in England until 1948. *Id.* William Blackstone wrote that parents, because they care for infants, "ought in return to be supported by their offspring," who owe them "honor and reverence" regardless of parents' misbehavior. *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES, *453). Thomson argues that these rules may have been "greatly circumscribed in reality." *Id.* at 268.

99. SMITH, *supra* note 40, at 359-60, notes that

[a man's] affections . . . are by nature more strongly directed towards his children than towards his parents, and his tenderness for the former seems generally a more active principle than his reverence and gratitude towards the latter. . . . Every thing may be expected, or at least hoped, from the child. In ordinary cases, very little can be either expected or hoped from the old man. The weakness of childhood interests the affections of the most brutal and hard-hearted. It is only to the virtuous and humane that the infirmities of old age are not the objects of contempt and aversion.

This distinction in "moral sympathies" may be the basis for the different legal treatment of obligations to parents and children. The former is statutory, limited to the necessities of life, and does not bind the adult child's spouse. The latter comes from the common law, is limited only by the parent's station in life, and binds the adult child's spouse as well. Compare LA. CIV. CODE ANN. arts. 224 & 229 (West 1993 & Supp. 1995) (stating that parents' duty to children is limited by station in life; children's duty to parents is limited by what is necessary) with *Felisa L.D. v. Allen M.*, 433 N.Y.S.2d 715, 717 (Fam. Ct. 1980) (ruling that wife's earnings were property of marriage to which husband contributed by being a "house husband," and therefore were available for payment of husband's legitimate child support obligation from a previous marriage) and *Hale v. State*, 408 A.2d 772, 774 (Md. Ct. Spec. App. 1979) ("Betty Hale is unemployed. Indeed, so is her husband, who is, of course, not responsible for the support of Mrs. Hale's parents.").

100. I thank my colleague Frank Buckley for this inspiration. Note that "[a]lthough the young may be less selfish than the old when the cost of being selfless is the same, the cost of voting selflessly may be higher for the young because they have more to gain or lose from the governmental policies at issue in the election, having a much longer period over which gains and losses can accrue to them." POSNER, *supra* note 70, at 119.

viewed as having two goals, lifetime consumption and preserving "trademark capital," the first goal will predominate during most of life. As there is less and less time to enjoy present consumption, however, the importance of the second goal will increase until shortly before the adult's expected death. At that time, this goal will occupy a preeminent position in the elderly person's preferences.¹⁰¹

Of course, elderly parents sometimes attempt to interfere with their children's decisions by violating the terms of the unspoken franchisee agreement that allows the child/franchisee to operate independently.¹⁰² In recent years, the courts have witnessed a rash of grandparent visitation cases.¹⁰³ The decisions have rather uniformly allowed visitation once divorce or death of an adult child disrupts the family.¹⁰⁴ However, courts have not been as receptive where the child's parents remain married,¹⁰⁵ nor when a new fam-

101. Preference trade-offs, or what economists call a person's utility function, are shorthand for whatever makes a person happy given existing resources. It consists of consumption items, leisure pursuits, and emotional and physical fulfillment.

102. Even in so-called "good families," the interaction of child with mother and father, and husband with wife, can be intense, causing disappointment and pain. See Rachel D. Cox, *Marriage and the Family*, in READINGS ON THE PSYCHOLOGY OF WOMEN 128, 129 (Judith M. Bardwick ed., 1972). Mothers and fathers often feel their children's "rejection by peers," their abuse at "the hands of callous adults," their "awkwardness" and "miscalculations," and their "misfortunes and failures keenly." *Id.*

There is the wounded pride and astonished unbelief when the bright promise of the toddler fades into the ordinariness of the school child. . . . In the traditional family the young adult struggles to shake off the bonds of parental love that expresses itself in solicitude and supervision. . . . And for the parent whose child has made the necessary leap to freedom, there is the pain of letting go, of turning back to the silent house, the untended bed, the abandoned books, and baseball bats.

Id. Yet most families are characterized by love, and most parents are entrusted with the care of their offspring without state or other interference. See *Parham v. J.R.*, 442 U.S. 584, 604 (1979).

103. In recent years, legislatures in all 50 states have enacted statutes giving grandparents visitation rights. Ann M. Jackson, Comment, *The Coming of Age of Grandparent Visitation Rights*, 43 AM. U. L. REV. 563, 564 & n.6 (1994); see also *In re Beckman v. Boggs*, 655 A.2d 901, 905 (Md. Ct. App. 1995) (upholding paternal grandparents' visitation rights after child's adoption by maternal grandparents); *Adoption of A.M.R.*, 527 N.W.2d 565, 566-68 (Minn. Ct. App. 1995) (refusing to terminate maternal grandfather's preexisting visitation rights after child was adopted by custodial father's new wife), *review denied*, 1995 Minn. LEXIS 351 (Minn. Apr. 18, 1995).

104. See, e.g., *Beckman*, 655 A.2d at 902; *In re Nearhoof*, 359 S.E.2d 587, 591 (W. Va. 1987) (holding that court-ordered grandparent visitation was "excessive" where child's parents were still married).

105. See, e.g., *Herndon v. Tuhey*, 857 S.W.2d 203, 209-10 (Mo. 1993) (en banc); *McIntyre v. McIntyre*, 461 S.E.2d 745, 747-50 (N.C. 1995) (holding that grandparents had no right to sue for visitation where no ongoing custody proceeding existed and minor children's family was intact); *Hawk v. Hawk*, 855 S.W.2d 573, 579-82 (Tenn. 1993) (refusing to grant court-ordered grandparent visitation where child's parents

ily has been formed by adoption.¹⁰⁶ For example, in the Tennessee Supreme Court case of *Hawk v. Hawk*,¹⁰⁷ an elderly couple and their adult son operated a bowling alley for many years before and after the son's marriage.¹⁰⁸ When the business relationship between the son and his parents began to deteriorate, so did the emotional relationship between the two generations.¹⁰⁹ Eventually, the parties became so estranged that the son and his wife refused to allow the grandparents to visit their grandchildren.¹¹⁰ For constitutional reasons, the Tennessee Supreme Court allowed the parents the freedom to make this choice,¹¹¹ at one point even characterizing the family as full of "entrenched animosity."¹¹² In an infamous, recent example of another type of grandparent interference, Pamela Bottoms successfully wrested custody of her grandson from her daughter Sharon, a lesbian.¹¹³

Sometimes adult offspring welcome continued parental control over their lives. For instance, in some divorce cases, parties have protected their assets in large family holdings because those assets were controlled by their parents.¹¹⁴ In other instances, where par-

were married and fit).

106. See, e.g., *Acher v. Barnes*, 236 S.E.2d 715, 716 (N.C. Ct. App.) (holding that natural father's consent to child's adoption by stepfather terminated paternal grandmother's visitation rights), cert. denied, 238 S.E.2d 149 (N.C. 1977). But see *Layton v. Foster*, 460 N.E.2d 1351, 1352 (N.Y. 1984) (holding that natural father's consent to stepfather's adoption of infant son did not terminate parental grandparent's visitation rights). See generally Kathleen S. Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 J. FAM. L. 393, 394 (1985-86) (examining state's authority to order grandparent visitation); Edward M. Burns, *Grandparent Visitation Rights: Is It Time for the Pendulum to Fall?*, 25 FAM. L.Q. 59, 61-72 (1991) (discussing grandparent visitation following adoption of grandchild); Samuel V. Schoonnaker III et al., *Constitutional Issues Raised by Third-Party Access to Children*, 25 FAM. L.Q. 95, 95-96 (1991) (examining constitutionality of Connecticut's broad grandparent visitation statute); Peter A. Zablotsky, *To Grandmother's House We Go: Grandparent Visitation After Stepparent Adoption*, 32 WAYNE L. REV. 1, 2-12 (1985) (discussing conflict between grandparent visitation statutes and effect of adoption statutes); Judith L. Schandling, Note, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 COLUM. L. REV. 118, 125-37 (1986) (discussing constitutional ramifications of grandparent visitation).

107. 855 S.W.2d 573 (Tenn. 1993).

108. *Id.* at 575.

109. *Id.* at 575-76.

110. *Id.* at 576.

111. *Id.* at 582.

112. *Id.* at 576.

113. *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995). There were allegations of unfitness by both sides. Sharon, the child's mother, had been unstable after her marriage broke up, while the grandmother, until shortly before the action was brought, maintained a long-term live-in relationship with a man who had allegedly abused Sharon.

114. However, courts sometimes do not allow assets to be shielded. For example,

ents seek to maintain control of their adult children's assets, parents have established family firms eventually run by their children.¹¹⁵ And grandparents are frequently an early choice for babysitters.¹¹⁶

One answer to the problems for families presented by Smiley¹¹⁷ and Kronman,¹¹⁸ is to come to a consensus as to the appropriate division of family property.¹¹⁹ James Buchanan pro-

in *Stainback v. Stainback*, 396 S.E.2d 686, 688 (Va. Ct. App. 1990), a husband's father established a corporation to help the husband pursue a career in art. The husband worked for the corporation by managing a storage facility and various farms as well as producing art works. During a divorce proceeding, the husband's estranged wife claimed that the corporation constituted part of the marital estate. In this case, the corporate veil was "pierced" since "the entity was formed for the benefit of the husband and his father, and the interests of ownership and management are inextricably entwined." *Id.* at 692. Thus, the wife was entitled to half of the corporate assets as her share of the marital estate. *Id.* It is also possible that a court would require assets to remain in family corporations to ensure that the assets are available to pay future alimony. For example, in *Watkins v. Watkins*, 265 S.E.2d 750, 751 (Va. 1980), a husband owned a minority interest in the family corporations, valued at approximately \$1,500,000. *Id.* During the divorce, the husband tried to sell his interest in the family corporations. The court, however, enjoined him from disposing of the stock, finding that the husband's continued ability to pay support depended on his continued ownership of the stock. *Id.* at 752.

115. One recent family feud, reported extensively in the *Washington Post*, concerns the various holdings of Maryland's Haft family, including Dart Drug, Crown Books, and Trak Automobile Parts. See, e.g., Sandra Torrey, Haft v. Haft, *One Family Legal Bonanza*, WASH. POST, Oct. 10, 1994, at WB7 (reporting legal feuds of Haft family in which father turned business over to son). Another example of litigation in this area is *Roanoke Engineering Sales Co. v. Rosenbaum*, 290 S.E.2d 882 (Va. 1982). In that case, a father entered into business as a manufacturer's representative in 1920, dealing in building supplies. *Id.* at 883. By 1962, the business had expanded considerably, and all the stock was owned by the father's four sons, each of whom served as an officer and director of the parent company. *Id.* Litigation ensued when one of the sons, after a policy disagreement with his brothers, was discharged from corporate office and relegated to employment as a salesman. *Id.* at 884. He resigned as an employee and accepted employment for a direct competitor of the family company, violating a covenant not to compete. *Id.* The Virginia Supreme Court ultimately upheld the covenant, enjoining the son from violating the contract for two-and-one-half years. *Id.* at 884-87.

116. A letter to Ann Landers laments, "I took care of two [grandchildren] from birth until they were a year old because their parents didn't want them in day care until they could walk. I also took care of another grandson five days a week, 10 hours a day, because his mother couldn't afford day care. Thank goodness he just started kindergarten." WASH. POST, Oct. 9, 1995, at C8.

117. See *supra* notes 1-9 and accompanying text (discussing *A Thousand Acres*). Remember also, in *King Lear*, there is bargaining between the daughters and their father over how many servants he can bring along on his visits to them. WILLIAM SHAKESPEARE, *KING LEAR* act II, sc. 4, lns. 199-285 (John D. Wilson ed., Cambridge Univ. Press 1984).

118. Kronman, *supra* note 35, at 5.

119. Outside the family, game theorists have studied such behavior in a two-per-

poses a rigidly defined succession rule such as primogeniture to prevent rent seeking.¹²⁰ If all family members understand from the beginning that only one child can inherit and which child that is, the cycling inherent in Kronman's contracts and the state of nature will not occur.¹²¹ Parenthetically, this analysis is challenged by hundreds of years of English history in which younger sons killed their older siblings or sent them to fight in the Crusades, which often amounted to the same thing.¹²²

Modern America has emphatically rejected primogeniture and has made it unprofitable to use violence to end the cycling phenomenon.¹²³ Yet as I grow older, and my friends' parents die, I hear more and more tales of families that have "fallen apart" when an elderly parent passes away and the estate, or even the personal property, has to be divided among the siblings.

How do we "fix" this problem? In one sense, we have fixed it already. Not only have we abolished primogeniture and prohibited property gains accomplished through murder, but we have also done much as a society to ensure that there won't be too much in most people's estates to squabble over. As we saw previously, most elderly people live on their own.¹²⁴ Most of them support themselves

son game called "The Ultimatum Game," in which one participant is given a sum of money and can divide it (without conversation) with the other. The second participant has the option of accepting or rejecting the proffered amount. See Richard H. Thaler, *Anomalies: The Ultimatum Game*, J. ECON. PERSP., Fall 1988, at 195, 195-96. More recently, people have played the game in a series of studies. CATHERINE ECKEL & PHILIP GROSSMAN, CHIVALRY AND SOLIDARITY IN ULTIMATUM GAMES AND THE RELATIVE PRICE OF FAIRNESS: GENDER DIFFERENCES IN A PUNISHMENT GAME (1994). Women tend to expect less from the men who offer them shares in the initial endowment, though on average they offer approximately the same amount.

120. Buchanan, *supra* note 64, at 78.

121. Buchanan maintains that the predictability of the rules for succession, rather than any particular rule itself, are relevant for eliminating rent seeking. *Id.*

122. Examples of this phenomenon that come to mind include Shakespeare's *Richard III*, as well as modern portrayals of the phenomenon in *THE LION KING* (Walt Disney 1994) and Peter Sellers', *THE WRONG BOX* (Columbia Tristar Home Video 1966). The biblical story of Jacob and Esau also fits this pattern of sibling rivalry, though with less violence. In this instance, the brothers' maneuvering for their father's blessing is complicated by a form of "blackmail" or "holdup." This blackmail occurs when Jacob insists that his father give him Esau's birthright in exchange for stew—a form of insurance. *Genesis* 25:28-34; see also Ben-Porath, *supra* note 60, at 8 (stating that "the deal between Jacob and Esau is a reminder that even within families there is no complete guarantee against such blackmail").

123. See, e.g., VA. CODE ANN. §§ 55-402 to -414, 64-1.18 (Michie 1995) (preventing people who slay family members from taking via intestacy); *Sundin v. Klein*, 269 S.E.2d 787, 791-92 (Va. 1980) (holding that husband may not take wife's share of property they held as tenancy by the entireties after he murdered her), *cert. denied sub nom. Cross v. Sundin*, 452 U.S. 911 (1981).

124. Margaret F. Brinig, *Finite Horizons: The American Family*, 2 INT'L J.

through some combination of Social Security, Medicaid, pension plans, and private savings. Today, the elderly live long enough to use up most of the resources they have saved, and perhaps more, leaving debts to nursing facilities and hospitals.¹²⁵ We have accomplished enough in medical technology to prolong the physical body past the point where mental activity has reached a point of diminishing returns—even to the point where the patient may actively resent his or her existence.¹²⁶

As the family lawyer in *A Thousand Acres* observes:

"In my experience, passing down the farm is always difficult. If there aren't enough sons, then there are too many. Or the daughter-in-law isn't trustworthy. Wants to spend too much time having fun. . . ."

Even though these aren't precisely the problems here, it's well to remember that this transition is always difficult. . . . And that, in most cases, once the transition has been made, and the older generation is taken care of, things can go back to normal for twenty years or so.¹²⁷

When there is no property¹²⁸ (as is the case with many elderly women who have outlived their husbands and any resources put aside for old age), the siblings may engage in a "hot potato" avoidance game, which may hurt their elderly parent directly (particular-

CHILDREN'S RTS. 293, 304 (1994).

125. Life expectancy increased from 67 years in 1969 to 71.8 years in 1989. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 76 tbl. 104 (1992). These changes have come in part through eradication of some diseases and advances in surgical technology. KEVIN KINSELLA & CYNTHIA M. TAUBER, U.S. DEPT. OF COMMERCE, INTERNAT'L POPULATION REP. NO. P95192-3, AN AGING WORLD II, at 23-30 (1993). For figures on the wealth, or lack of it, possessed by elderly Americans, see Karen C. Holder & Timothy M. Smeeding, *The Poor, the Rich, and the Insecure Elderly Caught in Between*, 68 MILLBANK Q. 191, 200 (1990) (citing data regarding the excessive expense of the chronically ill). See also Henry Cisneros, *Health Policy for an Aging Population*, 26 HOUSTON L. REV. 788-89 (1989) (same).

126. Posner reports that approximately 10% of the population in any given age bracket says that they are not too happy. The portion of octogenarians stating that they are very happy is about 30%, the same as for people between 30 and 39. POSNER, *supra* note 70, at 110-11. However, I have heard my own parents' friends talk of "doing a Kevorkian," and many have joined the Hemlock Society. Use of Kevorkian's suicide machine was permanently enjoined in *People v. Kevorkian*, 534 N.W.2d 172, 175 (Mich. Ct. App. 1995). *Id.*

127. SMILEY, *supra* note 1, at 283.

128. Possession of property, as *King Lear* and *A Thousand Acres* show, provides its own set of problems. Cf. Ben-Porath, *supra* note 60, at 7 ("Even the most extreme instances of seemingly unilateral giving—gifts and favors—are recognized as forms of exchange. Often they are given in order to create an obligation. . . . The tolerance of large outstanding balances signals the presence of trust or implicit threats." (citation omitted)).

ly their mother, since most victims of elder abuse are women), or indirectly as she sees she is no longer valued or even wanted by the children for whom she sacrificed so much.

In the commercial context, if the franchise has no value, the franchisees may well breach the franchise agreement and start out on their own, abandoning the franchise.¹²⁹ As a result, the franchisor will withdraw from the business.¹³⁰ With people, adjustment for the failing franchise cannot be so simple. Familial rejection of the elderly has always been a concern¹³¹ but not a common-law concern. However, states have enacted laws requiring adult children to provide for their "aged and necessitous" parents fairly recently,¹³² and still more recently have drafted legislation to deal with the increasingly visible phenomenon of elder abuse. But is this type of coercive legislation the best we can do?

To the extent that we have chosen public or self-support of the elderly over the historical family protection, we have closed off a vital link in the intergenerational structure of society. Gary Becker makes this argument in his Nobel address:

129. See, e.g., *Land O'Lakes, Inc. v. Fredjos Enter.*, No. 88-CO716, 1992 U.S. Dist. LEXIS 9224, at *2-4 (N.D. Ill. June 22, 1992) (noting that defendant repudiated franchise agreement because of losses resulting from franchise relationship).

130. See, e.g., *Picture Lake Campground, Inc. v. Holiday Inns*, 497 F. Supp. 858, 860-61 (E.D. Va. 1980) (noting that franchisor decided to withdraw entirely from business in which plaintiff/franchisee had invested). Where employers cannot monitor the behavior of employees, the threat of termination (with loss of reputation and the benefits of relationships formed at work) induces employees to work hard. See PAUL C. WEILER, *GOVERNING THE WORKPLACE* 70 & n.43 (1990); James M. Malcomson, *Work Incentives, Hierarchy, and Internal Labor Markets*, 92 J. POL. ECON. 486, 486-87 (1984).

131. Note the triennial tithing relief for the widows and orphans in *Deuteronomy* 14:28-29.

132. Statutes in some states do require some minimal support from working children if the aged and infirm parents would otherwise be on state support or in state institutions. See ARK. CODE ANN. § 20-47-106 (Michie 1991); CAL. FAMILY CODE § 4400 (West 1994); IND. CODE ANN. §§ 31-2-9-1, -2 (Burns 1987 & Supp. 1995); MD. CODE ANN., FAM. LAW § 13-102 (1991); MONT. CODE ANN. § 40-6-301 (1995); NEV. REV. STAT. ANN. § 428.070 (Michie 1991); N.J. STAT. ANN. § 44:1-140 (West 1993); PA. STAT. ANN. tit. 62, § 1973 (1968 & Supp. 1995); S.D. CODIFIED LAWS ANN. §§ 25-5-21, 25-7-27 to -28 (1992); VA. CODE ANN. § 20-88 (Michie 1995); W. VA. CODE § 9-5-9 (1990). See generally Alison P. Barnes & Lawrence A. Frolik, *America the Aging*, 16 FAM. ADVOC. 19, 22-23 (1993) (analyzing "worthiness" of elderly to receive social benefits); Catherine D. Byrd, *Relative Responsibility Extended: Requirement of Adult Children to Pay for Their Indigent Parents' Medical Needs*, 22 FAM. L.Q. 98, 87 (1988) (same); Terrance A. Kline, *A Rational Role for Filial Responsibility Laws in Modern Society?*, 26 FAM. L.Q. 195, 200 & n.47 (1992) (discussing current status of laws requiring children to support their parents); Renae R. Patrick, *Honor Thy Father and Mother: Paying the Medical Bills of Elderly Parents*, 19 U. RICH. L. REV. 69 *passim* (1984) (same).

[P]arents who do not need support when they become old do not try as hard to make children more loyal or guiltier or otherwise feel as well disposed toward their parents. This means that programs such as social security that significantly help the elderly would encourage family members to drift apart emotionally, not by accident but as maximizing responses to those policies.¹³³

Moreover, any abolition of pensions and other old-age benefits may have an unfortunate effect that goes beyond hardship to a current generation of elderly left without financial support.¹³⁴ Without cultural or community motivation, parents might still invest little in their children but invest greater in their own human capital.¹³⁵ The expectation under this alternative would be that one must provide for one's own old age and prepare to live it in isolation from one's kin—a lonely future indeed. In this time when we rethink the federal budget and reorder various social welfare programs, we need to remember these connections between the generations and the importance of the family. We need to regain some of the closeness of the famous *Middletown* adults, who not only maintained regular contact with their parents, but also enjoyed understanding, appreciation, obligation, and love between the generations.¹³⁶ In fact, we need to invest in these relationships more than ever since our lives will overlap with those of our parents to a considerably greater extent today than in earlier generations.¹³⁷

We would do well to remember the words expressed so long ago in *Adams v. Palmer*.¹³⁸

133. Becker, *supra* note 96, at 401; see also B. Douglas Bernheim et al., *The Strategic Bequest Motive*, 93 J. POL. ECON. 1045, 1074 (1985) (noting alleged general decline in attentiveness of adult children to parents since introduction of Social Security); Brinig, *supra* note 124, at 304-16 (demonstrating that change in provision for elderly parents affects both positive and negative investments in minor children).

134. As Epstein has noted:

[T]he natural parental investment in their children creates a bias for the protection of their future that legal and social institutions should exploit, not undermine. Taxing and regulatory policies designed to secure equality of wealth in the next generation do so at the cost of reducing the levels of capital accumulation

Epstein, *supra* note 38, at 1467 (1989). Epstein says the basis for the link is genetic and that transmission is largely through bequests. *Id.* at 1472-75.

135. See Langbein, *supra* note 94, at 729-39.

136. See ROBERT S. LYND & HELEN M. LYND, *MIDDLETOWN: A STUDY IN AMERICAN CULTURE* *passim* (1956) (studying community of Muncie, Indiana in 1929); see also Kyriakos S. Markides et al., *Sources of Helping and Intergenerational Solidarity: A Three-Generation Study of Mexican Americans*, 41 J. GERONTOLOGY 506 *passim* (1986) (documenting high levels of involvement and affection between elderly parents and their adult children in San Antonio's Mexican-American community).

137. See Peter Uhlenberg, *Death and the Family*, 5 J. FAM. HIST. 313, 318-19 (1980).

138. 51 Me. 482, 483 (1863). This opinion discussed marriage, not the extended

It is rather a social relation like that of parent and child, the obligations of which arise not from the consent of concurring minds—but are the creation of the law itself; a relation the most important as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress.¹³⁹

IV. FURTHER IMPLICATIONS OF THE FRANCHISE

As I mentioned at the beginning of this paper, the idea that family relationships continue even after legal ties dissolve or become less important is a notion with implications reaching beyond the problems we have discussed here. The franchise model has implications for children just “leaving the nest,”¹⁴⁰ for parties adopting, and for divorcing couples, especially those with children. The fact that the compacts we undertake in the family are not simple contracts with endpoints means that all family policy is critically important.

As I learn about families I become more and more convinced that close involvement by divorced parents with their children encourages more responsive (and responsible) behavior on the part of these parents.¹⁴¹ Conversely, a negative outcome results when divorcing parents use their children to further competitive or vindictive aims of their own.¹⁴² This idea contradicts not only the writings of some feminists, who worry about the increased power joint custody gives to divorcing men,¹⁴³ but also the important work of

family.

139. The view of the family as a building block of society, performing functions other social institutions cannot perform, is well expressed by Lee E. Teitelbaum, *Placing the Family in Context*, 22 U.C. DAVIS L. REV. 801, 812–22 (1989).

140. As one of my colleagues observed several years ago about his six grown children, “The umbilical cords at my house are rubber bands.”

141. Mnookin, *supra* note 15, at 287–89.

142. In one relatively recent case, for example, a mother accused a father of abusing their child and refused to produce the child for visitation. *Morgan v. Foretich*, 546 A.2d 407, 408–10 (D.C. 1988), *cert. denied*, 488 U.S. 1007 (1989). The judge ruled that the evidence of abuse was inconclusive. The mother was found in contempt for disobeying visitation orders and was incarcerated. For a literary example, see HENRY JAMES, *WHAT MAISIE KNEW* (Douglas Jefferson & Douglas Grant eds., Oxford Press 1991) (1897) (telling story about child whose self-centered parents were given alternating shared custody).

143. See, e.g., Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1442–51 (1991) (arguing that laws enforcing visitation by noncustodial parent—usually the father—reinforce traditional family roles); Carol Sanger, *M Is for the Many Things*, 1 REV. L. & WOMEN'S STUD. 15, 24–26 (1992) (arguing that custody laws rightly favor women because they typically do most daily parenting tasks); Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 630–37 (1992) (arguing that custody should

Goldstein, Freud, and Solnit,¹⁴⁴ who suggest that one parent should have control over visitation by the other (or anyone else) to satisfy the child's need for stability. However, the idea that both parents should stay closely involved with their children after divorce also results in stability. I will mention just a couple of the commentators who argue that continued involvement of fathers is tremendously important. Using the analogy of the federal system and the balance of powers, Ira Lupu posits that both parents are needed to keep the treatment of children on a middle ground.¹⁴⁵ John Murray suggests that the custody regime chosen at divorce ought to mirror as closely as possible the actual sharing of responsibilities during the particular marriage.¹⁴⁶

Covenantal (no "clean break") marriage may exist without the tie of children, too, although probably only in marriages that last for many years.¹⁴⁷ As a result, the "displaced homemaker" has proven one of the most difficult problems for courts and scholars discussing the role of alimony. Many times she (for at present it is almost always a wife) married and raised children under a system in which she was expected to invest in human capital that would aid her in "household production," rather than entering the labor market.

replicate predivorce parental roles).

144. JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 37-39 (1973).

145. Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317, 1330-52 (1994).

146. John S. Murray, *Improving Parent-Child Relationships Within the Divorced Family: A Call for Legal Reform*, 19 U. MICH. J.L. REF. 563, 584-88 (1986); see also PRINCIPLES OF MARITAL DISSOLUTION §§ 2.02(1)(b), (c) (Am. Law Inst. Tentative Draft (1996) (providing for involvement by both parents and replication of pre-divorce parenting arrangements). In the end, the families may come to the kind of accommodation reached by couples in the films *KRAMER V. KRAMER* (Columbia Tristar Home Video 1979) and *MRS. DOUBTFIRE* (Fox Home Entertainment 1993).

147. In *In re Estate of Atherley*, 119 Cal. Rptr. 41 (Ct. App. 1975), Harold left Ruth, his wife of many years, to move in with Annette. *Id.* at 42. Late in life he obtained an invalid Mexican divorce and then went through a marriage ceremony with Annette. *Id.* at 43. After Harold and Annette's "marriage," they bought property and made improvements to it. *Id.* Before his death, Harold saw Ruth again only because she felt sorry for him after he became sick. *Id.* at 45. Ruth never stopped calling herself his wife, however, and was found to be his surviving spouse when he died. *Id.* at 49.

In *In re Soper's Estate*, 264 N.W. 427 (Minn. 1935), a husband faked his own suicide, left his wife of many years, and assumed a new identity and took a new "wife" in Minnesota. *Id.* at 428. He told his new wife that his first wife had died. *Id.* After several years of being with this new mate, he actually did commit suicide. *Id.* He left insurance naming his "wife" as beneficiary. *Id.* at 428-29. The court held that the term "wife" could only mean the Minnesota woman. *Id.* at 432-33. It is possible that he felt guilty about his first (and only real spouse) or, as the dissent pointed out, that he worried about being found out. *Id.* at 433 (Olsen, J., dissenting).

When no-fault divorce made it possible for her marriage to end without her fault, she was left at divorce with few market skills, no reasonable prospect of "rehabilitation," and a life in shambles.¹⁴⁸

In many cases, the displaced homemaker is an obvious candidate for franchise because there were children who have now grown. Income sharing,¹⁴⁹ which is the likely remedy for such women upon divorce, ties husband and wife together unless she remarries,¹⁵⁰ clearly a franchise-like result. What is the franchise interest if there never was a child (and therefore a pride and genetic connection, at least)? It may well be that where people have lived together for decades, they share so much life in common that the marriage itself—the memories, perhaps the career, as well as whatever has been accumulated together—becomes the franchise.¹⁵¹ Women in these types of marriages constitute the most troublesome category for feminists who want to discourage dependence. As a transitional and humane matter, these dependent women must be protected.¹⁵² The real question is whether so much investment (which necessarily creates dependence) should be encouraged. Perhaps this is where the two categories of marriage might separate upon divorce: a "lite" version (without children and for a short time) and a "standard" version (with children or for many years), with different divorce rules¹⁵³ and different compensation schemes envisioned for each.¹⁵⁴

148. Carl Schneider and I describe such a wife as "Mrs. Appleby" in our AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS AND PERSPECTIVES 60 (1996).

149. For an early proposal suggesting income sharing tied to the length of the marriage, see Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1117–21 (1989).

150. Statistically, this is unlikely; only 30% of divorced or widowed women over 40 remarry. Larry Bumpass et al., *Changing Patterns of Remarriage*, 52 J. MARRIAGE & FAM. 747, 753–54 (1990).

151. See *supra* note 33.

152. Even the strongest advocates of a nondependence model would allow this. See Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in *DIVORCE REFORM AND THE CROSSROADS* 75, 75–77 (Stephen D. Sugarman & Herma H. Kay eds., 1990); Herma H. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CINN. L. REV. 1, 3 (1987); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1838–43 (1990).

153. To a limited extent, Virginia's divorce statute maintains such a difference, requiring a couple to be separated for six months before divorce if they have no children together and for one year before divorce if they do have children together. VA. CODE ANN. § 20-91(9)(a) (Michie 1995).

154. Other scholars have hinted at such an approach. See Jeffrey E. Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397, 447–51 (1992); Starnes, *supra* note 31, at 119–38.

The franchise regime also has important implications for the parental ties that are created and severed through adoption. For example, in her celebrated book, *The Joy Luck Club*, Amy Tan describes a mother who, fearing she will die, leaves infant twin daughters beside the road in the hope that they will be found and raised in a better life.¹⁵⁵ She spends the rest of her life looking for them, and it is only after her death that they are found.¹⁵⁶ In a case-law parallel, a Vietnamese woman places her children in a Saigon orphanage after a harrowing journey through the wartime central highlands of Vietnam.¹⁵⁷ Both the woman and her children end up in the United States. However, by the time the mother tracks her children down, one of her sons has been placed for adoption in an American home.¹⁵⁸

Someone who has acted in good faith will clearly be unhappy with any outcome in a court case involving such children. When a family has been disrupted by war, hardship, or death, need we cut the ties as cleanly as we do in adoption? From the perspective of mothers in dire circumstances, placement of a child can clearly be the appropriate action at a given time.¹⁵⁹ Should the child then know his heritage and how much the mother (or father) loved him?¹⁶⁰

The quest of birth parents and adopted children to find each other defies easy characterization.¹⁶¹ The law protects the birth

155. AMY TAN, *THE JOY LUCK CLUB* 25-26, 39-40 (1989).

156. *Id.* at 39-40.

157. Doan Thi Huang Anh v. Nelson, 245 N.W.2d 511, 513 (Iowa 1976). Clearly fathers are hurt by such circumstances as well. See Mary L. Shanely, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 66-77 (1995); cf. Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 390-99 (1994) (identifying needs and rights of parent-like individuals).

158. Nelson, 245 N.W.2d at 513. In this case, the court returned the child to his biological mother. *Id.* at 514.

159. Another familiar case comes from *Exodus*. Fearing that her son would be drowned on Pharaoh's order, Moses' mother places him in a basket where he is soon found by Pharaoh's daughter. *Exodus* 2:3-6. The mother, who has been watching nearby, is recruited to nurse him. *Id.* at 7-9. Thus, like the Vietnamese woman, Moses' mother is reunited with her son.

160. One of the issues in the contemporary film *LOSING ISAIAH* (Paramount 1995) is the transracial question we discuss at some length in SCHNEIDER & BRINIG, *supra* note 148, at 1074-95. The movie ends ambiguously with the possibility, however, of a franchise-like solution. See also Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER J. 39, 63 (1993) (suggesting alternatives to "traditional adoption," such as parenting by grandparents).

161. For a fairly recent fictional account of the process written for teenagers, see LOIS LOWRY, *FIND A STRANGER, SAY GOODBYE* (1978). In this book, a 17-year-old girl,

parents by hiding their identities from all who seek them,¹⁶² except in some clear cases of emergency. This is what adoptive parents want because the protection allows them to determine when, if ever, their children should be told of their adoptive status. Increasingly, states are responding to lobbying efforts on the part of both birth parents and adoptive children by enacting statutes permitting parents to leave identifying information with adoption agencies.¹⁶³ Although the provisions differ, the statutes usually allow adopted children, at their option, to discover the birth parents' identity at majority.

Does this appropriately satisfy the longing felt on both sides of what seems to be a franchise?¹⁶⁴ Or should we, as a society, move toward a more open adoptive process as some are urging?¹⁶⁵ One commentator has suggested that more open adoptions might produce a "middle ground" for cases in which fathers' rights have been cut off without proper notice, allowing children to remain in their current placement.¹⁶⁶ On the other side of the story, open adoptions might give more "market" power to birth parents, who seem to have the upper hand in the struggle to adopt a healthy, white in-

ready to leave for college, is given permission by her adoptive parents to search for her natural mother. Once she finds and speaks with her mother, she finds peace of mind.

162. See, e.g., *Alma Soc'y, Inc. v. Mellon*, 601 F.2d 1225, 1234-37 (2d Cir.) (concluding that requiring adoption records to be sealed does not violate Federal Constitution), *cert. denied*, 444 U.S. 995 (1979); see also *In re Roger B.*, 418 N.E.2d 751, 756-57, (Ill.) (denying adult adoptee access to adoption records where no compelling need was shown and because unsealing records could infringe on biological parents' rights), *appeal dismissed*, 454 U.S. 806 (1981). A moving article written by a birth mother highlights the problems and suggests a paradigm switch in the way we conceptualize the adoption process. Maureen A. Sweeney, *Between Sorrow and Happy Endings*, 2 YALE J.L. & FEMINISM, 329, 353-67 (1990).

163. See, e.g., CONN. GEN. STAT. § 45a-751(c) (1995) (permitting birth parents to make identifying information available to their children); IND. CODE ANN. § 31-3-4-26 to -28 (Burns Supp. 1995) (same); N.D. CENT. CODE § 14-15-16(10) (Supp. 1995) (same); VA. CODE ANN. § 63.1-126 to -236.01 (Michie 1995) (same).

164. For psychological evidence of this phenomenon, see Leverett Millen & Samuel Roll, *Solomon's Mothers: A Special Case of Pathological Bereavement*, 55 AM. J. ORTHOPSYCHIATRY 411, 412-17 (1985) and ARTHUR D. SOROSKY ET AL., THE ADOPTION TRIANGLE, THE SEALED OR OPEN RECORDS: HOW THEY AFFECT ADOPTEES, BIRTH PARENTS, AND ADOPTIVE PARENTS 55-72 (1984). For an account of her own experience, see Sweeney, *supra* note 162, at 329-33.

165. See, e.g., Laurie A. Ames, *Open Adoptions: Truth and Consequences*, 16 L. & PSYCH. REV. 137, 143-48 (1992); Nancy E. Dowd, *A Feminist Analysis of Adoption*, 107 HARV. L. REV. 913, 931-32 (1994) (reviewing ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* (1993)); Holmes, *supra* note 157 at 380-81 (discussing need for reform in adoption statutes).

166. See Annette Haselhoff, *Survey of New York Practice*, 67 ST. JOHN'S L. REV. 169, 174 (1993).

fant. My own view, consistent with the covenant and franchise themes, is that, on balance, permitting continued contact between parents and children (so long as the birth parents wish it) is a good thing.¹⁶⁷

The fact that this paper presents two models for a variety of problems—the sovereign-nation model and the franchise model—implies that we have some choice about which we prefer as a society. The sovereign-nation model obviously promotes independence and market-like behavior and carries with it the fragmentation characteristic of individualism carried to an extreme.¹⁶⁸ As should be obvious by this time, my personal choice, and the one I believe better fits real families and family law, is the franchise. Franchise also unifies us as a community—with our siblings, our parents, and our children.¹⁶⁹

Have we as a society already made some choice? To the extent that the sovereign-nation model dominates family relations today, it is the product of several forces, some directly and others only indirectly legal. The first force is no-fault divorce. When it became easier for couples to separate and form new families, attachments to spouses and children became in many ways more contingent. Particularly for men, who are said to view attachment to children in terms of their current relationships, family life in many cases becomes discrete: rent-a-husband or rent-a-dad.¹⁷⁰ The grand sweep

167. See, e.g., IND. CODE ANN. § 31-3-1-13 (Burns Supp. 1995) (identifying birth parents' post-adoption visitation rights); cf. *In re Adoption of Francisco A.*, 866 P.2d 1175, 1178 (N.M. Ct. App. 1993) (holding that trial court could allow foster mother visitation with children she had sought to adopt but who were adopted by another couple after foster mother's husband died).

168. The dangers of individualism in a family setting are explored by REGAN, *supra* note 16, at 83–88.

169. Compare *id.* at 115 (noting that family discourse “makes available a ‘middle distance’ that creates the possibility of a relational sense of self that is nonetheless relatively stable”). with SMLEY, *supra* note 1, at 20 (“[T]here is a distance that is the optimum distance for seeing one’s father . . .”). The healthy family permits a perspective of self from which each of us can grow to lead better lives.

170. No-fault divorce has had tremendous ripple effects upon the family. In the first circle lie the obvious changes in support and custody. See Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 112–19. Another ripple affects marriage—both when couples decide to marry and what they do once they are married. See Brinig & Crafton, *supra* note 22, at 883–92 (1994) (presenting an empirical study of effects of no-fault divorce upon birth rates, marriage rates, and spouse abuse); see also Margaret F. Brinig & F.H. Buckley, *The Price of Virtue*, PUBLIC CHOICE (forthcoming 1997) (manuscript at 8-14, on file with author) (asserting that high divorce rate and no-fault legislation increase the percentage of illegitimate births); Brinig, *supra* note 124, at 306–13 (asserting that divorce is positively correlated with child abuse across states); Wardle, *supra*, at 171 & n.205 (asserting that children of divorced parents are more likely to be juvenile delinquents).

of family life disappears.

The next legal intervention is the whole set of laws that established Social Security and Medicare and made private pensions attractive for employers and workers. When we concentrate on saving for our own old age (voluntarily or through taxation), we spend less on our children and trust less in our continued relationships with them.

A third legal change has been the lowering of the age of emancipation to eighteen. What this does (besides the obvious political changes of increasing the number of young voters) is to make college more the child's responsibility than the parents' (except in certain cases of divorce), and remove any force from parental guidance about decisions like youthful marriage. We have a shorter time during which our children are primarily our responsibility, and we have less time within which we can learn from each other and strengthen family bonds. Finally, perhaps in response to the social changes that I argue have been inevitably wrought by all these legal choices, we have enacted a spate of parental support and elder-abuse prevention laws. These laws constrict the scope of family privacy and protect against what used to be morally unthinkable—the abandonment or mistreatment of our parents or children.

What legal choices do we have, now that Pandora's box is open? Obviously, theoretically we can repeal some of the twentieth-century laws that have so shaped the family and thus reapproach an idea of franchise. But, like a "right to choose," we have gotten used to no-fault divorce. Also, the over-sixty-five lobby (understandably, since the safe harbor of family is no longer there) will probably prevent any retrospective changes in Social Security or other transfer programs for the elderly. Our college-aged children are likewise going to be hard-pressed to relinquish their Visa cards (though they might relish the idea of giving up their student loans). Would the supply of children for adoption increase or the demand by adoptive parents decrease if adoption were made more open?

Less concretely but more legally, we can encourage investment in our families. Joint-custody laws apparently motivate noncustodial parents (most of them fathers) to continue to support their children. A two-level divorce system, with divorce more difficult where there are children, also encourages more committed families.¹⁷¹ An education tax deduction, particularly for college educations, may also encourage stronger ties. What about tax deductions for payments

171. For a discussion of such alternative divorce systems, see Elizabeth S. Scott, *Rational Decision Making About Marriage and Divorce*, 76 VA. L. REV. 9, 73-79 (1990).

made to support elderly parents? Or low-interest loan programs for children who wish to build "in-law" additions to their homes? What about reducing inheritance taxes so that elderly people won't feel that they will lose a large part of what they have earned if they don't consume it (or give it away) during life?

The presence of families enriches us most obviously, perhaps, when we are helpless infants completely dependent upon adults, or growing children flourishing under parental care and affection, or loving spouses sharing common lives. To the extent that we stop thinking about other members of our family as special people, we become poor indeed, relative to other times and to other places.¹⁷² The nuclear family may be the central image, but what has happened to all the animating forces that surround it?

As a final thought, the system of family law I have proposed here in some ways reflects a "difference" feminist approach.¹⁷³ Men, more than women, think binarily and in terms of absolutes: right and wrong, victor and vanquished, self versus other.¹⁷⁴ To these dualities, I would add married versus unmarried, child versus adult, parent versus stranger. I maintain that family, and therefore family law, is continuous, not discrete. One does not just turn a family off and on like an electric switch. To the extent we have built laws that deny the oceanic expanse and eternity of family life, we create regret and hurt, moral malaise and longing. When we see these negative emotions in large categories of people encountering family laws, we need to be alert to a need for change. Some of our current laws seem to encourage pathological behavior, such as elder abuse, will contests, deadbeat attitudes, and surrogacy contests and other ugly custody battles. Just as we can legislatively choose the franchise solution, we can encourage more positive family outcomes.

172. This may be quantitatively as well as qualitatively true. See Brinig, *supra* note 124, at 307-13, for an empirical analysis of the effect of connection with elderly family members upon a variety of investments in "human capital," including increased standardized test scores and decreased child abuse. The study tests the effects on a state cross-sectional and international basis. *Id.* at 307.

173. For writings by "difference" feminists, see, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE 25-39 (1982) (analyzing differences in perception of boys and girls); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Law-yeing Process*, 1 BERKELEY WOMEN'S L.J. 39, 42 (1988) (concluding that legal profession fails to take differences between men and women into account).

174. See GILLIGAN, *supra* note 173, at 64-104; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1547 (1991) ("The western concept of law is based on a patriarchal paradigm characterized by hierarchy, linear reasoning, the resolution of disputes through the application of abstract principles, and the ideal of the reasonable person."); Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 462 (stating that law relies on rights and adopts abstract hierarchy of rules regulating interaction of individuals).