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Foreword: Family Restructuring at the End of the Twentieth Century—Issues for a New Century

Lynn D. Wardle*


As the chair of that conference, I have been invited to write an introduction to this issue. I do so in four parts. First, I describe the three-day regional conference. Second, I summarize the conference papers that have been selected for publication in this issue. Third, immediately after each abstract, I briefly comment on each paper, suggesting lines of further discussion and inquiry. (The purpose of such comments is not to criticize the articles, for each of them is excellent, but to expand consideration of the problems and analysis presented. In the familiar tradition of American legal education, I attempt to engage in a kind of Socratic dialogue to refine and enhance serious consideration of important subjects.) I also review and comment on four student pieces relating to family law that are published in this issue. I conclude with some reflective observations about the themes which emerged from these papers and the conference presentations that suggest the issues of family law and policy that will be of prevalent concern as the Twenty-first Century opens.

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I. THE 1993 NORTH AMERICAN REGIONAL CONFERENCE OF THE ISFL

The ISFL\(^1\) is well-known for its superb, scholarly world conference, held approximately every three years in different locations around the world.\(^2\) Those week-long gatherings attract hundreds of scholars in family law and other related disciplines from around the world. The multitude of different cultures, legal systems, and academic disciplines represented provides immensely valuable opportunities for formal and informal comparative discussions. Selected papers presented at such conferences have been published and are valuable reference sources.\(^3\) Because of the success of the world conferences, and the length of time between them, regional conferences have been convened in Africa, Asia, and Western Europe. Yet the ISFL had never sponsored a regional gathering of family law scholars in North America before 1993.

The members of the ISFL Executive Council from North America thought that a conference designed specifically for American and Canadian family law scholars would be extremely beneficial.\(^4\) I was selected Chairman of the Conference and, with excellent support from the ISFL and

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\(^{1}\) The ISFL is an organization with more than 350 members in more than 50 countries.

\(^{2}\) The next (8th) world conference planned by the ISFL, dealing with the topic of Families Across Frontiers, will be held June 28-July 2, 1994 in Cardiff, Wales. For more information, contact Professor Nigel Lowe, 1994 ISFL Conference, Cardiff Law School, P.O. Box 427, Cardiff CF1 1XD, Wales, U.K.


\(^{4}\) Professor Sanford Katz of Boston College Law School, Professor Don MacDougall of the University of British Columbia Faculty of Law, Professor Margo Melli of the University of Wisconsin Law School, and I, are members of the Executive Council of the ISFL, and together we functioned as the planning committee for the North America Regional Conference.
many of its distinguished members, we began planning a regional conference in the summer of 1991.

The culmination of the planning was the Jackson Lake Conference on Family Restructuring at the End of the Twentieth Century, attended by nearly a hundred family law professors, and a sprinkling of lawyers, scholars, and professionals in related disciplines including psychology, psychiatry, social work, and family studies. Most of the participants were from the United States (about 84 registrants) and Canada (about 12 registrants). However, other registrants came from as far away as Japan, Sweden, and Denmark.

During the three-day conference, seventeen sessions (usually two or three sessions ran simultaneously) were conducted involving more than fifty scholarly presentations. Additionally, a general welcoming session, opening dinner, and conference luncheon provided opportunities for all participants to come together. Professor Anders Agell of the University of Uppsala, Sweden, President of the ISFL spoke at the luncheon. He drew on his extensive comparative and international experience to contrast legal policy, technique, and thinking concerning family law in civil and common law jurisdictions.

The presenters were invited (though not required) to submit their papers for publication consideration. Approximately one-third did so, and from those papers, the articles included in this issue of the B.Y.U. Journal of Public Law were selected. Other papers were submitted to the International Journal of Law and the Family, published at Oxford University, some of which have been selected for publication there. The papers published here provide an excellent and representative sampling of the quality and scope of the conference presentations.

5 In addition to the aforementioned members of the Executive Council, many family law scholars assisted with the planning and selection of the program. Space does not permit mentioning all of them, but Professor Carol Bruch, Professor Frances Olsen, Professor Harry Krause and Professor Carl Schneider were particularly generous with their time and suggestions.

6 The key individual in the administration of the Conference was Lisa Stamps Jones, a law student at the B.Y.U. Law School who is simultaneously pursuing a graduate degree in educational administration. With her excellent administrative talents and her enthusiasm for planning and management (and with the gracious and cheerful support at the conference of her husband, Steve) the conference was a successful and memorable event.
II. BRIEF REVIEW AND DISCUSSION OF THE PAPERS

Margaret Mahoney’s contribution, *A Legal Definition of the Stepfamily: The Example of Incest Regulation* directly addresses the most prominent manifestation of “families in transition.” Professor Mahoney, a leading contemporary authority on the law of stepfamilies in the United States, notes that the traditional emphasis on the nuclear family prevents many persons who reside in other types of stepfamilies from enjoying the same type of recognition for their relationships. As stepfamilies account for nearly thirty percent of all married couple households with children in America, Professor Mahoney urges legal recognition of the parental rights and responsibilities of those relations. Since more than ninety percent of all stepparents are men, the issue of incest among steprelations is not insignificant. Yet in about one-third of all states, incest laws do not extend to steprelatives, and the prohibitions in other states vary profoundly. Relevant laws include both civil marriage prohibitions and criminal incest proscriptions. The Tennessee Supreme Court’s decision in *Rhodes v. McAfee*, is faulted for not recognizing the long-term purported marriage of a stepdaughter to her stepfather for purposes of awarding the woman surviving spouse rights. Professor Mahoney calls for a comprehensive legal definition of stepfamily for the next century, as well as a sensitive policy analysis of how family laws should relate to steprelatives.

The hybrid nature of step-relations certainly creates very thorny problems. Vacillation, if not inconsistency, seems inevitable. For example, criticizing the lack of uniform and equal treatment of stepfamilies and biological-nuclear families is not entirely consistent with applauding exceptions to the general application of family laws to stepfamilies. Likewise, criticism of the Tennessee Supreme Court decision in *Rhodes*, for not recognizing (for purposes of surviving spouse rights) the

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8 457 S.W.2d 522 (Tenn. 1970).

9 Id.
marriage of a stepdaughter-stepfather reflects the ambivalence that has thwarted the development of the law regarding stepparent incest and marriage affinity prohibitions, and created the patchwork of inconsistencies that Professor Mahoney justly decries. Professor Mahoney’s thorough research and multi-faceted analysis elucidates well the need for a comprehensive, systematic legal reform to harmonize the laws pertaining to stepfamily incest and marriage restrictions.

Laurence C. Nolan’s *Honor Thy Father and Thy Mother: But Court-Ordered Grandparent Visitation in the Intact Family?* criticizes the trend to statutorily authorize court-ordered grandparent visitation over the objection of natural parents in intact families. Originally, grandparent visitation statutes applied only after the breakup of a family to prevent a vindictive custodial parent from terminating contact between the children of the divorce and the parents of the noncustodial spouse. The second generation of grandparent visitation statutes, however, allows courts to order parents in intact families to permit their parents (the grandparents) to visit their children (the grandchildren).

Professor Nolan notes that grandparents’ claims to visitation do not meet the constitutional test for fundamental rights. The policy underpinnings of the principle of family autonomy are carefully considered, and the value of state non-interference are explained in terms of diversity, natural law, and practicality. The conflicting interests of grandparents, grandchildren, and the state are identified. Professor Nolan recommends the traditional standard for intervention in custody contests between parents and non-relatives: showing harm to the child from denial of visitation, and showing that visitation is in the best interests of the child (BIC). The BIC standard alone is not appropriate because grandparent interests do not cancel out parental interests like the interests of competing parents do. Grandparents have an appropriate avenue of access to grandchildren in intact families through their own children who are the grandchildren’s parents, so state-ordered grandparent visitation in the absence of death, divorce, or separation, is unjustified. Equating grandparent visitation to noncustodial parent visitation is inapt. The stress of litigation and disruption of the forced visitation is detrimental to grandchildren, since sociological studies show that the most significant factor shaping the influence of grandparents on grandchildren is the grandparent’s
relationship with the parent of the grandchildren. The importance of intact families for the proper development of children exceeds the importance of grandparent contact, especially when the latter comes at the cost of damaging the former. The fundamental constitutional right of parents to rear their children includes the right to determine who may visit with their children. A compelling justification to infringe this constitutional right exists when harm to the child can be shown, not merely when a child may be better off with grandparent visitation. Courts that look only for what is best for the child typically overlook the detrimental effects on the child of a court making such decisions.

Professor Nolan makes a strong case for the need of greater protection to safeguard nuclear family relations from unwanted grandparent interference than the simple BIC standard provides. Her recommended two-step standard requiring first a showing of harm, might be reduced to one step; if the grandchild is harmed from denial of visitation, then it may be presumed that grandparent visitation is in the best interests of the child. But some might argue that denial of an association that is "best" for a child is "harmful" to the child (compared to the achievable result). "Harm," like "best interests" is a pliable concept. Ultimately, the issue turns on some very practical questions: What is the standard of proof? How much harm must be proven to support a legal finding of harm? Likewise, resort to the doctrine of family autonomy requires consideration of the dysfunctional family—not divorced or separated, but not functioning as a real family in any meaningful way. Professor Nolan's thorough analytical dissection of the arguments for grandparent visitation with children in intact nuclear families is very impressive, and grounded in realism.

Phyllis Bookspan's *From a Tender Years Presumption to a Primary Parent Presumption: Has Anything Really Changed?... Should It?* begins by reviewing the evolution of legal presumptions regarding child custody upon divorce. Then she argues that private decision-making about custody should be preferred, because parents, not judges or other professionals, know what is best for their children, and most families are able to make appropriate custody decisions without state intervention. Professor Bookspan suggests that a clear "determinative" legal rule should be adopted. She asserts that a "bright line" standard which tells the parties what result the
court is likely to reach if they do not privately settle the matter, encourages private ordering. Highly discretionary standards, such as “best interests of the child,” and idealistic standards, like “joint custody,” are criticized as being impractical, unrealistic, and encouraging unnecessary litigation. The “primary caretaker” presumption is the best determinative standard because it is the most realistic, reflecting actual nurturing patterns and reasonable parental expectations. If it is gender-biased, that merely reflects the reality that substantially more mothers than fathers make the effort and devote the time to be the principal nurturer of their children. However, if the law too inflexibly adopts any definition of custody (such as “primary caretaker”), it will give the custodian absolute or near-absolute control. The preferred-party then has no incentive to bargain to let the other parent have any custodial responsibility. Thus, reasonable contact with the noncustodial secondary caretaker should be expected.

Professor Bookspan’s analysis has the persuasive appeal of common sense. The problem, as she recognizes, is the uncertainty of vague rules regarding custody. Her arguments for a “determinative” custody rule are quite reasonable. The call for mandatory reasonableness in bargaining over visitation, however, seems to let the cat of uncertainty slip back in through an open window. Even a bright-line “determinative” rule regarding who gets custody will not solve the problem of uncertainty if the definition of “custody” is vague. Thus, a determinative rule for custody (like primary caretaker) should be complemented by a determinative rule regarding what custody entails, and a determinative definition of visitation rights. It is worth noting that there is a growing trend among both legislators¹⁰ and commentators¹¹ to provide minimum or default visitation schedules or time periods, applicable in case the parties are unable to reach agreement between themselves as to what amount or routine of visitation is best for the children. However, if we combine a determinative rule regarding custody with a determinative rule defining visitation rights, have we not effectively undermined the prospects for parents to privately determine custody arrangements for their

children, which is the primary value the determinative rules seek to achieve? Professor Bookspan's rigorous analysis is an excellent step toward grappling with these tough issues.

Allen M. Parkman, a Professor of Management, gives an economic analysis of the costs and consequences of the no-fault divorce revolution in Reform of the Divorce Provisions of the Marriage Contract. Negotiated termination of marriage under traditional divorce-for-fault grounds has been replaced by unilateral termination of marriage-at-will under no-fault laws, resulting in detrimental financial and quality-of-life consequences for divorced women and their children. In contract terms, marriage has changed from a contract for the joint lives of the parties with specific performance the remedy for breach, to a contract terminable at will, subject to liquidated damages prescribed by statute. Because women usually significantly alter their circumstances by family-enhancing specialization, the change in marriage contract law leaves them particularly vulnerable. Marriage is a contract, and a fundamental function of contract law is to encourage long-term investments and to discourage opportunistic behavior. Contract remedies provide incentives for parties to make decisions that produce social benefits. The loss experienced by the spouse who has specialized in family-enhancing skills is underestimated upon divorce. Employment and education for married women may not provide benefits to the family as much as it provides insurance for the married woman in case of divorce. Children in a divorce bear a heavy cost that goes uncompensated in the divorce damage calculation. The cost could be avoided in some cases if the law gave parents greater incentive to make marriage work. Professor Parkman proposes that a Marriage Code similar to the Uniform Commercial Code be drafted to encourage marriage duration for the joint lives of the parties, and with specific performance as the preferred remedy for breach of the marriage agreement. No-fault divorce should be permitted only when divorce costs are low, as when the divorce occurs early in marriage or before children are born.

Professor Parkman's contract analysis cuts to the heart of the dilemma of no-fault divorce. No-fault has reduced the marriage contract from one of significant legal commitment and reciprocal reliability to one of individual convenience and instability. Some scholars call post-no-fault marriage contracts
"illusory." The focus on remedies is understandable as economic analysis must operate on quantifiable factors. The problem with economic analysis, as Professor Parkman hints, is the difficulty of accurately quantifying intangible family values, including "human capital" of family-skill specialization. Likewise, the social and personal value of intact families, of family continuity, and of full-time or significant nurturing of children by a parent may not be recognized by purely economic analysis any more than these intangibles are recognized in current "rights" analysis. For instance, economic analysis may recognize the potential financial benefit to individuals and their families when a married person substantially abandons caretaking responsibilities to pursue a lucrative but demanding career that leaves inadequate time and emotional resources for family responsibilities, but can it measure the potential intangible costs to the individual, the spouse, the children, the marriage, the parent-child relationships, the quality of family life, or to society (in terms of lost self-esteem, drug, sex and delinquency problems, etc.) of that step? Can it quantify the real cost of infidelity by a married man or woman—to self, spouse, children, marriage, or family? Economic analysis tends to undervalue and devalue non-economic goods, qualities, and conditions. Thus, drafting a Marriage Code modelled after the Uniform Commercial Code may perpetuate the devaluation of many intangible qualities that make marriage and family meaningful and desirable. Professor Parkman's excellent article invites us to examine these issues, and challenges us to take the contract dimension of marriage more seriously.

Professor Cynthia Starnes article, Stories of Dissociation and Buyout: Applications of a Contemporary Partnership Model for Divorce, also provides an economic-oriented analysis of divorce, comparing modern divorce to dissociation from a partnership. Modern marriage ideology, the "egalitarian

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relationship," retains the entity concept ("one flesh") of the common law. But most marriages are not equal; the responsibilities of family "caretaking" still are assumed largely by (and sometimes requiring full-time commitment of) women. As a result, the income-earning ability of married women suffers significantly. Borrowing from partnership disassociation, where the enterprise continues after a partner drops out, Professor Starnes proposes a "buyout" approach to achieve more equitable economic distribution upon the dissolution of marriage. Examples from traditional, hybrid, and egalitarian marriages are considered, and special exceptions to the buyout rule, which benefit the high-achieving caretaker and the childless caretaker who might get relatively little under a pure partnership buyout model, are suggested.

Professor Starnes impressively unmasks the equality myth, i.e., the denial and devaluation of the real costs of "caretaking" services that are typically provided by married women for the benefit of their families. Her incisive discussion of the hidden costs of caretaking forces one to question other hidden aspects of the marriage partnership, such as the denial and devaluation of the real worth and value of these "caretaking" services. The partnership buyout analogy is helpful, but may be of limited practical value. In an era of late-marriage (or remarriage) patterns, as well as dual-income, diminished-caretaking marriage patterns, one wonders whether buyout would provide significant protection to increasing numbers of women whose real investment in their husband's income-producing enterprise may be demonstrably diminishing. Moreover, partnership dissociation and buyout are appropriate models only if the partnership enterprise continues despite one partner leaving it. Some fundamental assumptions of the application of partnership buyout to marriage termination may need to be examined. The justification for treating a marriage that ends in divorce as an "enterprise that continues," or of assuming that all "income-generating activity of the marriage" is the real "marital enterprise," or of computing the real value of the marital enterprise without considering how much the sole (or greater) income earner would be earning if she had not gotten married, or of requiring buyout payments to continue long into the future, in perpetuity (less like dissociation than silent partner or shareholder participation) is not self-evident. While questions such as these must be addressed, Professor Starnes excellent paper has convincingly shown that the
partnership model is a promising legal analogy. Intuitively modern marriage is widely felt to be and experienced as a partnership or shared endeavor.\textsuperscript{14}

In \textit{Access to Legal Remedies: The Crisis in Family Law}, Professor Jane C. Murphy addresses the neglected practical problem of the delivery of legal services to the low- and moderate-income population. Family law services are the most frequently-requested type of legal assistance (thirty-two percent) sought by indigent persons in the United States, yet between one-half and four-fifths of those requests are not met. Almost one-half of all litigants in domestic cases are unrepresented; including ninety-three percent of defendants in child support cases. A realistic case study illustrates the severe practical dilemmas a middle-income family experiences regarding access to legal services upon divorce. As a significant increase in public funding for family law services is unlikely, Professor Murphy recommends adopting substantive rules (such as the primary caretaker rule in custody disputes) that make it easier for unrepresented parties to obtain fair legal consideration. She also recommends improving the procedures and structures (no hearings, summary proceedings, use of nonlawyer aides, increasing pro se programs) to fairly accommodate the situation of unrepresented parties.

Professor Murphy offers a viewpoint of great potential value to the legal profession. Such mundane matters as court procedures, forms, filing regulations, location of tribunals, and method of proceeding may do more to provide or prevent justice than grand theoretical doctrines and impressive substantive reforms. Professor Murphy's article precipitates reconsideration of some basic issues. One might begin by noting that the financial barriers to legal services for low- and middle-income Americans affect all kinds of legal problems, not just family law problems. Why should family law be given priority or preference in facilitating access to the courts? Is it because family law problems are the type of problems for which our legal system functions best? Is it because parties who take family law problems to court are best satisfied with the results, and come away with the best impression of the value of our legal system? Is it because there are no other, certainly no better, places to obtain relief for family problems than lawyers

\textsuperscript{14} See \textit{infra} pp. 15-16.
and courts, and no better solution for family problems than legal solutions? Will life in the United States really be better if we double or quadruple the amount of family litigation by indigent and moderate-income parties? Will their lives really be appreciably enhanced? Finally, one wonders whether the problems identified are limited to and the reforms suggested should be limited to low-income families, or whether the nature of family law disputes does not suggest that they should be significantly de-formalized, if not de-legalized, regardless of the income of the parties. Professor Murphy's revealing empirical studies and realistic perspectives not only underscore the need for practical reforms, but raise some important questions about the epidemic of legalization of family relations.

In Legal Policy, Technique and Research in Family Law: Some Comparative Aspects, Professor Anders Agell of the University of Uppsala, Sweden and President of the ISFL, contrasts the open, fairness-seeking objectives of the common law countries with the regulated, foreseeability-protecting objectives of civil law countries. He notes that differences in legal scholarship between American and civil law countries particularly reflect these technical differences. Coherence in legal policy is Professor Agell's preferred approach to comparative legal studies, and examples concerning the role of contract in family law, treatment of professional degrees, relationship between property division and alimony, and treatment of common law marriage and non-marital cohabitation are described. Professor Agell concludes by noting the value of comparative law for enhancing understanding of one's own national law.

Comparative family law insights may be very revealing, as Professor Agell's irrefutable observations about the discretion-protecting preference of common law jurisdictions and the predictability-protecting approach of civil law jurisdictions demonstrate. His emphasis on finding "coherence" in comparative legal studies reminds us that husbands and wives, parents and children are fundamentally alike in significant ways, regardless of where they live or the cultures from which they come. It could be added that differences and divergences in the family policies, techniques and scholarship of different countries are very revealing, too. In the laboratories of different legal systems different approaches function as social experiments that permit skilled comparative family law researchers to discern the advantages and disadvantages of
various potential solutions to ubiquitous problems of family law and social policy.

III. BRIEF REVIEW AND DISCUSSION OF STUDENT CONTRIBUTIONS

In addition to papers presented at the Jackson Lake Lodge conference, this issue of the *B.Y.U. Journal of Public Law* contains four students pieces addressing family-law-related issues. *In the Best Interest: The Adoption of F.H., An Indian Child* by Ivy N. Voss, examines the dilemma of the adoption of Indian children by non-Indian adoptive parents under the Indian Child Welfare Act (ICWA). The case of *In re Adoption of F.H.*,15 launches the study. F.H. was born with symptoms of Fetal Alcohol Effects to a native Alaskan woman and an unknown man. She was in foster homes from birth, reared from age four-months by the Hartleys, who adopted her when she was two years old. Shortly thereafter they had to move from Alaska to Washington. Her mother voluntarily relinquished her parental rights so that the Hartleys could adopt F.H. The mother's native American village of Noatak opposed the adoption and proposed placement with a member of the extended family, but the trial court and Alaska Supreme Court found "good cause" for circumventing the ICWA statutory preferences for extended family and tribal placement. Ms. Voss gives a sympathetic review of the policy and purposes of the ICWA and summarizes some dilemmas of interpretation, including the definition of "Indian Child," tribal rights, exclusive tribal court jurisdiction, and placement preferences under the ICWA. Constitutional issues ranging from violation of state authority to regulate domestic relations to racial discrimination have not been entirely resolved. The Alaska Supreme Court interpretation of the ICWA, making the best interest of the child a "good cause" consideration, is lauded.

The ICWA addresses one of the most fascinating and difficult issues in family law—the role of racial or cultural identity in custody or adoption placement decisions. The inconsistencies created in the effort of lawmakers and judges to balance competing considerations are apparent in both the ICWA and Ms. Voss' analysis of them. If the typical modern American view of what is "best" for an Indian child is so

different from what the typical (or a specific) Indian tribe or culture thinks is best for the child (on the basis of fundamental cultural disagreements on value questions for which there are no absolute rational standards), one wonders how asking typical American judges to apply the "best interest of the child" standard will help resolve the dilemma. On the other hand, one wonders about the rationality of giving tribes a veto power over an adoption decision made by Indian parents for the benefit of a child, when that decision is endorsed by independent social workers, and reviewed and approved by an impartial judge. Clearly a tribe is a political unit with a direct political interest in enhancing its political base and its legal power, regardless of the welfare of children. The power given the tribe seems directly inconsistent with the values underlying the Supreme Court's constitutional view of the relations of family, state and child.16 Consideration of the policy foundations of the ICWA is certainly timely.

Billye D. Baird examines one of the provocative issues of biomedical ethics and family law in *Fetal Tissue Transplants as Treatment for Parkinsonian Patients: A Miracle Cure or Science Fiction Nightmare.* After describing the etiology of Parkinson's Disease, Ms. Baird reviews the complicated political history of the moratorium on federally-funded research involving fetal tissue taken by induced abortion. The arguments for and against the moratorium are capably summarized and compared, and some internal inconsistencies in positions on both sides are noted. The political denouement of the controversy—President Clinton's executive order and approval of congressional legislation—are described. Ms. Baird concludes that the moral concerns about fetal tissue transplants encouraging abortion are significant and override the arguments for medical need and benefit which are very tenuous.

The debate over the use of fetal tissue for medical research is a fascinating controversy in which political concerns seemed to dominate and rational analysis seemed to disappear. The argument that many women will be persuaded to have abortions they otherwise would not have is empirically unsupported and seems questionable. *Roe v. Wade,*17 long ago, made abortion a matter of private choice, and surveys of the

17 410 U.S. 113 (1973).
reasons why women have abortions consistently show that most women get abortions for personal or social, not therapeutic, reasons.18 In an age when mere personal preference is deemed an acceptable reason for most of the 1.5 million elective abortions annually,19 the argument that a significant number of women will be persuaded to have an abortion because some person might receive some medical benefit as a result of the abortion may be strained. This review of the ethical considerations involved in the fetal tissue debate clarifies many of the serious dimensions of an issue that seems to have been trivialized by politicization.

In Losing Sticks from the Bundle: The Incompatibility of Tenancy by the Entireties with Life and Legislation in the Late Twentieth Century, Barbara Sharp examines the protection for an innocent spouse when a forfeiture claim under the comprehensive Drug Abuse Prevention and Control Act of 1970 is made against property held as tenancy by the entireties. United States v. 1500 Lincoln Avenue,20 is the focus of the analysis. In that case the federal government sought forfeiture of the real property (site of a pharmacy) that was the locus of the illegal drug sales. The property was owned as a tenancy by the entireties by the convicted drug dealer and his wife. The district court dismissed the forfeiture complaint on the ground that such a tenancy cannot be severed by illegal activities. The Court of Appeals for the Third Circuit reversed and remanded, holding that the innocent wife of the drug dealer should have a life estate that would ripen into fee simple title should her husband predecease her. Ms. Sharp reviews the numerous

18 Aida Torres & Jacqueline D. Forrest, Why Do Women Have Abortions?, 20 Fam. Plan. Persp. 169, 170 (1988) (a 1987 survey of 1900 women who had sought abortions reported the following motivations: rape or incest, 1%; personal health problems, 7%; possible fetus health problems, 13% (although only 8% actually sought medical advice); problems with relationship or desire to avoid parenthood, 51%; presently unable to afford a baby, 68%; concern about how baby would change life, 76%); Geraldine Faria, Ph.d. et al., Women and Abortion: Attitudes, Social Networks, Decision-Making, 11 Soc. Work Health Care 85, 90-92 (1985) (of 517 women seeking abortion the following reasons were given: rape, 0.8%; fear of pregnancy, 1.2%; physical problems, 6%; no partner, 15.3%; financial problems, 25.9%; lack of parental readiness, 33.5%). Utah statistics on the reasons for abortion from 1978-1990 reveal that over 98% of all abortions are performed for reasons of private choice or convenience (not rape, incest, fetal deformity, or maternal health). Utah Department of Health, Induced Abortions in Utah (1978-1990 eds.).
19 Id.
20 949 F.2d 73 (3rd Cir. 1991).
authorities supporting the position taken by the district court, notes that the district court decision was consistent with state law principles that forbid a creditor or bankruptcy proceeding to disturb the tenancy by the entireties, and criticizes the Court of Appeals for creating a “new estate” less valuable to Mrs. Bernstein. Finally, calling for abolition of this type of property estate, Ms. Sharp criticizes the fictional unity of husband and wife that underlies tenancy by the entireties because it is outmoded, and it interferes with bankruptcy, creditors remedies, and drug foreclosures.

Certainly most modern marriages do not reflect the belief that husband and wife are of one mind in all things. But mutuality is required in many important matters of marriage, including, for example, sexual relations, adoption, etc. Even in mundane financial matters, at the practical level, many marriages function on the basis of mutual agreement (e.g., where they will move to find or take employment, whether they will purchase a four-door sedan or two-door sports car, whether to buy a hide-a-bed or simple sofa, what color to paint the hallway, etc.). Criticism of tenancy by the entireties because the entity concept of marriage is outmoded in modern marriage ignores the fact that tenancy by the entireties is voluntarily chosen by many married couples. That raises at least the possibility that when it comes to home ownership—the most valuable (often the only significant) asset many married couples have—the concept of a unified marital entity is actually appealing to some modern married couples who want such a major investment to be possessed and controlled on a joint-and-mutual basis, with right of survivorship in the spouse. The fact that merchants, bankruptcy creditors, and police agencies may be somewhat hampered in their efforts to dispossess married couples from their homes seems hardly a compelling reason to abolish an estate that has protected the financial and lodging security of married couples and families for centuries. This paper raises good questions about real property estates and family arrangements that merit further careful consideration.

Prosecution of Child Abuse on Federal Lands: A Hole in the Wall by F. Chris Austin considers the gaps in federal legislation addressing the problem of child abuse on federal lands in general, on Indian lands in particular. Mr. Austin reviews some of the major federal laws designed to motivate and facilitate local (state and tribal) child abuse prevention and prosecution, noting that this type of federal child abuse
legislation is relatively well-developed. He also reviews federal laws directly prohibiting or authorizing prosecution of child abuse on federal land, which have focused on child sexual abuse and often overlooked physical abuse and neglect. There is no federal law prohibiting nonsexual child abuse on federal land. Such acts must be prosecuted under state law under the Assimilative Crimes Act,\(^\text{21}\) which does not apply to offenses in Indian country, or must be prosecuted under general assault provisions of the federal criminal code, which are not made for child abuse prosecution. Mr. Austin proposes three possible federal legislative remedies.

The problem of child abuse prevention and punishment has not been ignored by either the states or by the federal government. Child abuse legislation has been one of the "growth areas" of family in both state and federal law for two decades. Unfortunately, the abuse of children is one of the ugly byproducts of the breakdown of the family and the evisceration of other mediating institutions—the communities that foster and enforce values, such as neighborhood, extended family, church and ethnic community (including tribe). Ironically, proposals to increase direct federal responsibility for solving the problem only exacerbate this problem. Strengthening the initiative of the federal government, remote from the influence that cause child abuse, has the effect of weakening the communities that are closest to the source of the problem and best situated to deal effectively with it. This short piece does not consider the dilemma of different cultural definitions of abuse and neglect (a major concern underlying the enactment of the Indian Child Welfare Act).\(^\text{22}\) It raises serious issues of federalism and cultural diversity. Mr. Austin's report reminds us that there are some huge gaps in the national system of child abuse punishment laws.

IV. CONCLUSION: REFLECTIONS ON THE FAMILY LAW ISSUES THAT WILL GREET THE TWENTY-FIRST CENTURY

As the papers published herein demonstrate, a wide variety of issues, policies and problems were addressed at the North American Regional Conference. But common points can be discerned. First and foremost, the desire for fairness in the


law is an overriding concern. Virtually every reform proposal and analysis of policy issues explicitly or implicitly, raised fairness as an underlying consideration. Second, changing social circumstances were noted in all of the papers. Living in an age of constant and rapid change clearly is felt and reflected by these scholars. Third, the value of families and family relations is either expressed or assumed in all of these papers. Despite the profound social changes that have occurred and are occurring, it appears that the family is, in the words of Mary Jo Bane, "here to stay." Fourth, a desire for greater legal protection of family relations, particularly for those who are dependent upon and who invest heavily to benefit the family, is a prominent theme of these papers, as it was throughout the conference.

One other theme was suggested more by its absence than by its presence in the papers presented herein, and at the North American Regional Conference generally. It appears that conflict-theory ideology and dogmatic, gender-interest-driven analysis are abating among serious family law scholars. Gender-based concerns in family law are neither novel nor insignificant; the connections between gender and family role are too long-established and well-documented by too many disciplines to be ignored or dismissed. However, the narrow advocacy of gender-preference in legal policy, puts a type of special class-preference above principle, and raises serious concerns about fundamental values of individual rights, equal justice, family integrity, and the rule of law. Likewise, conflict-based theories of family relations may describe the dynamics of some forms of family dysfunction and deviance, but by ignoring the historical experience of functional families they present a distorted model of family life on which to base laws and policies. Many modern conflict- and gender-viewpoint approaches have been myopically reductionist, diminishing families, family relations, law, and policy not merely to the

23 MARY J. BANE, HERE TO STAY: AMERICAN FAMILIES IN THE 20TH CENTURY (1976).


25 "The too familiar vice of the present age is to obtrude as manifest truths, mere fancies, born of conjecture and superficial reasoning, altogether unsupported by the testimony of sense." William Harvey, quoted in DANIEL J. BOORSTIN, THE DISCOVERERS 367 (1983).
sum of the parts (male and female, parent and child) but centrifugally casting them into adversary male-versus-female, and parent-versus-child conflict alignments. If the sad experience of many individuals with family dysfunction and family breakup proves it is necessary for the law to recognize the potential for, and address the flare-ups of such conflicts, to let that vision of the family dominate public policy and scholarship makes no more sense than to adopt triage or emergency room medical services as the model for all medical services. The presentations at the North American Regional Conference, as represented by the papers published here, demonstrate that serious family law scholars now generally value analysis of family law issues from more balanced and complete perspectives.

Thus, there appears to be a consensus among North American family law scholars that these five thematic concerns dominate the analysis of family law and policy at the end of the Twentieth Century. The opening of the Twenty-first Century will probably find family law scholars searching for ways to empower appropriate discretion in family dispute resolution, to cope with changing social values and family arrangements, to recognize the hidden value of families and family relations, to protect those who depend upon and sacrifice to promote the welfare of individual family units, and to analyze family law issues from perspectives that go beyond narrow conflict-based theories or rigidly ideological gender-preference advocacy.