BOOK REVIEW

STATUS, CONTRACT AND COVENANT

Reviewed by Margaret F. Brinig†

A REVIEW OF Family Law and the Pursuit of Intimacy by Milton C. Regan, Jr.

INTRODUCTION

For many years, I have taught family law from a contracts perspective. Increasingly, this approach has made me uneasy because reducing family law to a nexus of contracts seems to present only a partial picture. Milton Regan illuminates my discomfort in his new book Family Law and the Pursuit of Intimacy. He suggests that concentrating on individuality, as we must in studying contracts, causes us to lose sight of the intimacy that makes family relationships worthwhile. Instead, he advocates returning to a world where both contract and a redefined status model coexist. For Regan, status is shorthand for all things of value in a family that are lost in the contractual frame, especially the interdependence that creates a sense of responsibility. In arguing for a return to intimacy, he draws upon an impressive body of social science literature and paints a picture that is sensitive to everyone's feelings and to groups who might object to the use of the venerable term "status."

Like much of the communitarian literature, Regan's book sets a mood rather than providing an agenda. It examines what the family looked like in its "golden age" and how those notions, designed to foster intimacy, have changed in the late twentieth century. Regan is particularly effective in showing how these changes alienate and re-

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1 I cannot, of course, claim to be the first to notice the problem. See, e.g., CAROL WEISBROD, THE BOUNDARIES OF UTOPIA 186-99 (1980); Carl E. Schneider, Moral Discourse and the Transformation of American Family Law, 83 Mich. L. Rev. 1803, 1832 (1985). My position, however, is unusual among law and economics scholars. Cf. Lloyd Cohen, Marriage, Divorce, and Quasi-Rents; or, "I Gave Him the Best Years of My Life", 16 J. LEGAL STUD. 267 (1987) (noting that although specific performance of marital duties may be possible, the essential spirit will not be there).

2 Regan is an Associate Professor of Law at Georgetown Law Center.


4 REGAN, supra note 3, at 4.
move us as people from any real context while simultaneously promoting individuality. Regan’s descriptions and attention to details of past and present families make wonderful reading. The book, however, does not provide any real solutions to the lack of intimacy he finds. In the end, though the reader may understand the social criticism and grasp the problems presented, she does not have a clear sense of how to remedy these problems.

Although his criticism of the contract model is effective, Regan’s analysis falls short precisely because he strives for fairness and sensitivity. In assuming a defensive posture, he dilutes a powerful analogy to avoid criticism by feminists and gay rights advocates. Regan quickly points out the weakness of status as describing intimacy: historically, status connoted hierarchy, male dominance, and Victorian attitudes. However, Regan assures us that status need not be so encumbered. Regan advocates a refined status by using new default terms for families that would encourage security and intimacy, and discourage inequality. Under this model of status, the American family could then recapture only the golden parts of an earlier era.

Other possible routes for inquiry exist. We could admit the failure of contract and simply return to our grandparents’ model for families. Before World War II, the typical American household could be characterized by a husband who earned wages in the labor force, a wife who maintained the home and cared for the couple’s children, and the three or four children who lived with them. Despite the attractiveness that this doctrine might possess, however, we would undoubtedly fail to stuff the genies of sexual equality and individual choice back into their bottle.

Alternatively, we could accept Regan’s premise that the contract perspective has problems and search for another paradigm. We could, for instance, employ the ancient term “covenant” to describe the bonds between husband and wife, parent and child. The covenant concept lacks the sexist connotations of status, but even more than status it links two individuals unconditionally and permanently.

5 By returning to our grandparents’ model, I mean that we could abandon no-fault divorce, remove incentives for women’s participation in the job market, and return to gender-based custody presumptions. I discuss the difference between the “grandparents’ model” and the late twentieth-century model in Margaret F. Brinig & Steven M. Grafton, Marriage and Opportunism, 23 J. Legal Stud. 869, 875-81 (1994).

6 I am not the only recent author to examine the idea of covenant. Janet Moore, in Covenant and Feminist Reconstructions of Subjectivity Within Theories of Justice, 55 Law & Contemp. Probs. 159, 167-89 (Summer 1992), uses the covenant paradigm as a foil for economic man, much as Regan has used status. Moore writes in general jurisprudential terms rather than talking about family law. She provides many more examples from Old Testament literature than I have included here. She begins her analysis by looking at criticism of the writing of Thomas Hobbes, seventeenth-century originator of the individualist social contract theory. Id. at 163-64. Hobbes opined that one should “consider men...
This concept, however, has some problems. Perhaps, like Regan, we ignore covenant because we encounter it in settings that are religious or archaic. Moreover, the covenant traits of faithfulness and permanency might make us uncomfortable in a time when the marriage promise "until death do us part" only works half the time and when even children can divorce their parents.7

An example drawn from Regan's book illustrates the difference between contract, status, and covenant. Regan's conclusion features a hypothetical married man who has gradually become more involved with his work and less involved with his wife and daughter. He is contemplating divorce, and Regan notes that modern society promotes the message that "ultimately Dad's involvement with his family is a matter of personal choice."8 The modern marriage, and even fatherhood, becomes a matter of contract to be honored only if there is no better alternative. Regan suggests that family law should provide an alternative—a vision of a person in context or relationship.9 This is status, which in this case would, at a minimum, cause the hypothetical man "to think very carefully about the ramifications of what he does" for his wife and daughter.10 Yet however legally difficult it may be to extricate himself from his family relationships, the man can take this step in Regan's relational or status-based family. A covenant, however, even more than a diamond,11 is forever.12 Even if the couple divorces,
vestiges of their relationship remain, particularly if there are children. A family covenant, much like a promise “running with the land,” cannot ever completely dissolve. The parent remains a parent even when the children have left home and have families of their own.

In proposing a covenant alternative, I suggest that we can reassess the problems of family as contract without the baggage of status. This review begins by examining Regan’s picture of the family. In the next sections, I pose some questions that he leaves unanswered, describe the alternative model of covenant, and, like Regan, reexamine the family, this time using the new framework of covenant. Finally, I conclude by addressing some of the doubts left lingering after reading Regan’s very provocative book.

I
A GUIDED TOUR THROUGH FAMILY LAW AND THE PURSUIT OF INTIMACY

In his introduction, Regan contrasts contract with status. He stresses that a contract requires neutrality and is therefore not useful for a collective or normative view. He calls the person viewed in contractual terms the “acontextual self” because such a person is considered without regard for his or her social relationships. It follows that private life becomes the domain of the individual rather than that of the family.

Unlike Regan, other scholars focus on the individual actor within the family. Marriage or parenting under the consequent contractual view becomes a collection of loosely affiliated individuals pursuing at 183. In Moore’s words, it “provides space for the meaningful exercise of individuality and liberty.” Id.

13 REGAN, supra note 3, at 2. This means, of course, that a contracts analysis cannot be normative. However, the defenses of illegality and unconscionability certainly appear to be societal value judgments about particular types of contracts. See, e.g., Watts v. Malatesta, 186 N.E. 210 (N.Y. 1933) (illegal wagering); New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471 (5th Cir. 1961) (upholding contract which allegedly violated N.C.A.A. eligibility rules under “clean hands” doctrine); Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563, 633-46 (1982) (arguing that distributive and paternalist motives are pervasive in the fields of contract and tort, though the rules are not characterized as such).

14 REGAN, supra note 3, at 2.

15 REGAN, supra note 3, at 3. Historically, as Regan notes later in the book, courts have considered privacy in terms of the family or home as opposed to the state or public. See, e.g., Katz v. United States, 389 U.S. 347 (1967) (interpreting the Fourth Amendment as only protecting certain areas, including a private home); Meyer v. Nebraska, 262 U.S. 390 (1923) (upholding state law requiring that teachers instruct their students only in English); see also William J. Everett, Contract and Covenant in Human Community, 36 Emory L.J. 557, 559 (1987) (noting that contract’s emphasis on the free will of individuals inevitably leads us to construe human life in terms of intrinsically atomized persons who then construct artificial, secondary relationships to pursue their individual advantage).
their own aims and interests.\textsuperscript{16} In such a view, the law would intervene only when someone else is harmed.\textsuperscript{17} This vision of the self is "fundamentally asocial."\textsuperscript{18} While acknowledging that the contractual model does add some important dimensions to our understanding of family, Regan would replace a strictly contractarian framework with one combining its useful elements with a status paradigm that encourages "relational identity."\textsuperscript{19}

His status hybrid would provide "a sense of oneself as defined in part by relationships with others."\textsuperscript{20} He suggests that we learn from the Victorians, who "were the first to confront the widespread influence of modernism."\textsuperscript{21} These earlier Americans saw the family as a network of interdependent roles, which they reinforced through legal status.\textsuperscript{22}

Regan asserts that family law should provide not only "a neutral framework for private ordering," but also a normative framework.\textsuperscript{23} It "should promote a substantive moral vision of commitment and responsibility."\textsuperscript{24} In Regan's opinion, reintroducing status not only would reduce alienation but would also have at least three beneficial effects. First, increased responsibility and commitment by both parties to a marriage may reduce the number of divorces. Second, when divorce occurs, it need not lead to as much economic dislocation as it does, particularly for custodial mothers.\textsuperscript{25} Finally, men may not see

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\textsuperscript{16} See Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse 121-30 (1991) (discussing the deconstruction of the family into collections of loosely affiliated individuals pursuing their own aims and interests). I wonder how often this is true. Perhaps at my job I am viewed as my own agent. However, in academia, I am a George Mason professor, a label that carries its own set of connotations. After work, I become the mother of my children. When I return to Wisconsin, my childhood home, I become the daughter of my mother. All of these definitions are relational, rather than merely descriptive, of me personally as a lawyer, a good cook, or a Midwesterner.


\textsuperscript{18} Regan, supra note 3, at 3.

\textsuperscript{19} Id. at 4. Regan is thus advocating a full circle, if Henry Maine was correct in his description that law has moved from status to contract. Henry S. Maine, Ancient Law 163-65 (1863).

\textsuperscript{20} Regan, supra note 3, at 4. See also Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law 267-311 (1990) (pointing out the dangers to family members who have lacked power—women and children—in adopting either a rights-based approach that ignores historical difference or a relational approach that denies them the basic rights accorded to others).

\textsuperscript{21} Regan, supra note 3, at 4.

\textsuperscript{22} Id.

\textsuperscript{23} Id.


\textsuperscript{25} See, e.g., the research reviewed in Lee E. Teitelbaum, Legal Regulation and Reform: Divorce, Custody, Gender and the Limits of the Law: On Dividing the Child, 92 Mich. L. Rev. 180,

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fatherhood as an occasion of loss—the loss of freedom to act without constraint.

Already we can see the strengths and weaknesses of Regan's work. In criticizing contract and advocating greater moral responsibility, Regan avoids making certain judgments. For example, his work is carefully neutral about such diverse topics as law and economics, feminism, and same sex relationships. He discusses the topics of status and morality at length, while referring to religion only in passing. However, his ultimate goals, strengthening the family, reinventing fatherhood, and reawakening community, deserve only praise.

A. The Victorian Construction of Intimacy

During the Victorian age, men and women operated in “different spheres” that we also call “household production” and “the labor market.” Husband and wife each had a distinct role to

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26 Regan, supra note 3, at 5. The loss is currently like the loss of bachelorhood we celebrate through raucous parties the evening before a wedding takes place. Regan’s idea that modern fatherhood is not as rich as it can or should be is foreshadowed in Jerry W. McCant, The Cultural Contradiction of Fathers as Nonparents, 21 Fam. L.Q. 127 (1987) (discussing cultural discrimination against fathers as providers and protectors of their wives and children in a society which embraces the tough, macho he-man). See also Michael E. Lamb, The Changing Roles of Fathers, in The Father’s Role: Applied Perspectives 3 (Michael E. Lamb ed., 1986) (discussing the “new fatherhood”); Norma Radin & Graeme Russell, Increased Father Participation and Child Development Outcomes, in Fatherhood and Family Policy 191 (Michael E. Lamb & Abraham Sagi eds., 1983) (compiling data which demonstrates that unique relationships between father involvement and child development emerge when fathers make caring for children an important activity in their lives).

27 Regan, supra note 3, at 32, 58, 176. Carl Schneider noted that because religious views are less universally and strongly held, statements of moral aspiration linked to religion have slipped from legal discourse. Schneider, supra note 1, at 1845.

28 Regan, supra note 3, at 5. See also Bruce C. Hafen, The Family as an Entity, 22 U.C. Davis L. Rev. 865 (1989) (advocating legal reforms that will help restore a sense of caring commitment to family relationships).


Although he notes the problems with this gender differentiation, Regan does not consider the average Victorian "sexually repressed, emotionally remote, [or] hypocritical." He argues that the Victorian reliance on status in family law was part of an effort to "preserve a relational sense of self in the face of perceived atomizing tendencies of modernization."

Nineteenth-century family law "fostered a vision of the family as a set of reciprocal roles" in which the individual's relationship to family members defined proper behavior. Thus a person's legal identity in the family, or status, made her "subject to a set of publicly imposed expectations largely independent of [her] preferences." Any at-

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32 Regan, supra note 3, at 6. Regan adopts without question the contemporary wisdom that Victorians thought men and women by nature were fit for different pursuits. Early Supreme Court decisions opined such a notion. See, e.g., Bradwell v. State, 83 U.S. 130, 141-42 (1872) (Bradley, J., concurring). Perhaps women themselves began this notion as simply a means to an end. The hours and working conditions in factories made work outside the home, farm, or cottage industry an unattractive alternative for the married woman. See infra note 55. It is possible to argue, even for more modern couples, that although parties are equally talented when they marry, they later may adopt specialized roles within the marriage. These "efficient" marriages resemble the Victorian separate spheres. See, e.g., Allen Parkman, No Fault Divorce, What Went Wrong? (1992) (description of Becker's model); Becker, supra note 31; Brinig, supra note 31, at 456-58.

While Victorian reformer Catharine Beecher thought some hierarchy in the family was necessary, it was not based on a man's inherent superiority, but rather in the spirit of a manufacturing firm:

For this purpose, it is needful that certain relations be sustained, that involve the duties of subordination. . . . The superior in certain particulars is to direct, and the inferior is to yield obedience. Society could never go forward, harmoniously, nor could any craft or profession be successfully pursued, unless these superior and subordinate relations be instituted and sustained.


33 Regan, supra note 3, at 7.

34 Id. at 8. Thus the market's liberal virtues of individualism and competition could be kept separate from the family virtues of altruism and cooperation. See Catharine E. Beecher & Harriet Beecher Stowe, The American Woman's Home 17-20 (1869). Several scholars criticize this theme. See, e.g., Linda Kerber, Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History, 75 J. Am. Hist. 9, 20-21 (1988); Olsen, supra note 31, at 1504-05, 1520-21.

35 Regan, supra note 3, at 9.

36 Id. The values of the family were not confined to the home, but ultimately would extend to all of American society. As Beecher wrote in A Treatise on Domestic Economy:

The success of democratic institutions, as is conceded by all, depends upon the intellectual and moral character of the mass of the people. . . .
attempt to alter these "standard form" rights and duties was unenforceable. Breach of these duties did not give rise to an independent cause of action, but sometimes would give the injured spouse the right to divorce.

Of course, the history of the American family does not begin with the Victorians. As Regan notes, in colonial America the family was a "basic unit in an interconnected chain" rather than a distinct grouping. Because the family was a crucial economic

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37 Regan, supra note 3, at 10. Regan uses as an example a case where illegal cohabitants sought to make marriage "strictly personal matter." Id. Perhaps a better example is the series of cases in which modern married couples have tried to alter "essential elements" of the marital contract. See, e.g., In re Marriage of Higgason, 516 P.2d 289, 296 (Cal. 1973) (wife was liable for husband's support during the time they were living together); Favrot v. Barnes, 332 So. 2d 873 (La. Ct App. 1976) (premarital understanding cannot amend or repeal nature of marital obligations declared by statute).

38 See, e.g., State v. Rhodes, 61 N.C. 453 (1868) (no criminal assault and battery for wife beating); McGuire v. McGuire, 59 N.W.2d 336, 341 (Neb. 1953) (no right to injunctive relief when husband of means refused to provide wife with such amenities as new clothes and indoor plumbing).

39 Regan, supra note 3, at 12 (citing Joel P. Bishop, New Commentaries on Marriage, Divorce, and Separation 220 (1891)). Bishop, a nineteenth-century commentator, called divorce an action for breach of duty (a tort) rather than for breach of contract. Id. Cf. June Carbone & Margaret F. Brinig, Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform, 65 Tulane L. Rev. 953, 957-61 (1991) (portraying nineteenth-century divorce not as a tort but as a breach of contract action, protecting women by awarding what was essentially expectation damages in contract). This characterization avoids Bishop's problem that restoring divorcing parties back to their premarital position (reliance) "gives no damage for a wrong inflicted, and affords no restraint against breaches of matrimonial duty." Regan, supra note 3, at 12 (quoting Bishop, supra, at 441).

40 Regan, supra note 3, at 17. See also Jean-Louis Flandrin, Families in Former Times: Kinship, Household and Sexuality in Early Modern France 173 (Richard Southern trans., 1976) [hereinafter Families in Former Times] (discussing the relatively undifferentiated roles of men and women). This view was not accepted by more patrician Americans. Thomas Jefferson, who in 1787 on his tour of southern France saw women and children "carrying heavy burthens [sic], and labouring with the hough. [sic] This is an unequivocal indication of extreme poverty. Men, in a civilised country, never expose their wives and children to labour above their force or sex, as long as their own labour can protect them from it." Thomas Jefferson, Notes of a Tour into the Southern Parts of France, &c., in 11 The Papers of Thomas Jefferson 1 January to 6 August 1787, at 415 (Julian P. Boyd ed., 1955).
individual emotional fulfillment was not essential to the colonial household. Work took place in the home and in the surrounding fields so that it was an extension of the home. Gender roles were indistinct as compared to those in Europe.

The physical separation of work and home into separate domains or spheres pulled the early American home into the modern era. In contrast to the cynical and self-centered working world of the early capitalists, the Victorian home offered an asylum and a place where the tired and defiled worker could be rejuvenated. The family, headed by its priestess wife, was to mold character in all its members by inculcating an ethic of duty and self-restraint that could hold egoism in check.

Although the Victorian family took on some important new functions, in some senses it was less of a community. As Regan notes, the members of the household were no longer "meshed together by common productive property and shared work experience," but rather were involved with deliberate decisions, such as whether to finance education or training. There was thus greater subjectivity and a tendency away from communal norms. In fact, many of our family-centered holiday traditions date from this period because of the need for common values and goals.

41 REGAN, supra note 3, at 17. It is still crucial today, of course, although not in a market production sense. In colonial America, marriages were particularly important to secure social standing because wealth was closely tied to land holdings. See, e.g., Margaret F. Brinig & June Carbone, The Reliance Interest in Marriage and Divorce, 62 TULANE L. REV. 855, 862-63 (1988); Charles Donahue, Jr., What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century, 78 MICH. L. REV. 59, 81 (1979).

42 REGAN, supra note 3, at 18.

43 Id.

44 Id. at 19. See also CATHARINE BEECHER, A TREATISE ON DOMESTIC ECONOMY i-x (Katheryn Kish Sklar's introduction to the paperback edition); COTT, supra note 32, at 67-68; KATHERYN KISH SKLAR, CATHARINE BEECHER: A STUDY IN AMERICAN DOMESTICITY 193-94 (1973) [hereinafter AMERICAN DOMESTICITY].

45 REGAN, supra note 3, at 21.

46 See, e.g., MARY RYAN, THE EMPIRE OF THE MOTHER: AMERICAN WRITING ABOUT DOMESTICITY 1830-1860, at 96 (1982); SKLAR, supra note 44, at 113 (recounting the general bargain being struck in society limiting women's participation in society in exchange for total control over the home). See also BEECHER & STOWE, supra note 34, at 222 (describing the married woman as the "sovereign of an empire").

47 REGAN, supra note 3, at 24-25. See generally Lindley, supra note 36, at 328 (quoting Catharine Beecher's statement that woman's duty was to "train immature, weak, and ignorant creatures").

48 REGAN, supra note 3, at 23 (quoting RYAN, supra note 36, at 185).

49 REGAN, supra note 3, at 26-27. "[T]he nineteenth century featured the appearance of such family oriented celebrations as... the birthday cake, the Christmas tree, Christmas presents, Christmas caroling, and the Thanksgiving turkey." Id. (citing STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 48 (1988)).
Regan does not consider that it may have been entirely rational for only one spouse to participate in the labor force. Perhaps it is thus unnecessarily defensive for him to equate the Victorian home and market dichotomy with the subjugation of women. In their recent paper, Jeremy Atack and Fred Bateman present new evidence that the average workday in the United States, as late as 1880, was ten hours. However, this average includes shorter days for work in which women probably could not have participated. For example, mine, lumber and construction workers all worked less than ten hour days. In the food, clothing, and textile industries, which involved women, at least ten hour workdays were required. Participants in the food industry generally averaged more than eleven hours per day. During the decades before 1880, the period when the doctrine of "separate spheres" developed, work days were even longer. It was probably impossible for a woman with family and household responsibilities to work at least ten hours per day outside her home. Indeed, even today with modern appliances, such a work schedule is unusual.

Regan asserts that for women, "'[n]ineteenth-century American society provided but one socially respectable, nondeviant role for women—that of loving wife and mother.'" It is accurate to limit this comment to the middle class. In rural families, respectable single women worked throughout the nineteenth century at New England textile mills, helping support their families until they found appropriate

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51 Id. at 139.
52 Id. at 140.
53 Id.
54 This was not true in the South, where workdays averaged less than 10 hours. Id. at 138-39.
55 A contemporary observer portrayed the clothing worker as being:
   With fingers weary and worn,
   With eyelids heavy and red,
   A Woman sat, in unwomanly rags,
   Plying her needle and thread—
   Stitch! stitch! stitch!
   In poverty, hunger and dirt,
   And still with a voice of dolorous pitch
   She sang the "Song of the Shirt!"
   Thomas Hood, "The Song of the Shirt"

Thomas Hood, The Song of the Shirt, PUNCH (1843) in 2 ELIZABETH K. HELSINGER ET AL., THE WOMAN QUESTION: SOCIETY AND LITERATURE IN BRITAIN AND AMERICA 1837-1883, at 115 (1983). Helsinger and her co-authors quote a woman as writing, "H.W. has three children; leaves home at five on Monday; does not return till Saturday at seven; has then so much to do for her children, that she cannot go to bed before three o'clock on Sunday morning." Id. at 123.
56 Regan, supra note 3, at 28 (quoting CAROLL SMITH-ROSENBERG, DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA 213 (1985)).
husbands.\textsuperscript{57} Working class women, and particularly immigrants, worked even after they married; although sometimes their work, such as laundering, could be done in their homes.\textsuperscript{58} A movement pioneered by Catharine Beecher, also renown for her contributions to the “separate spheres” ideology, created new “women’s places” in schools and hospitals.\textsuperscript{59} These respectable, middle-class positions re-

\textsuperscript{57} See, \textit{e.g.}, THOMAS DUBLIN, \textit{WOMEN AT WORK: THE TRANSFORMATION OF WORK AND COMMUNITY IN LOWELL, MASSACHUSETTS, 1826-60} (1979); \textit{see also} W. ELLIOTT & MARY M. BROWNLEE, \textit{WOMEN IN THE AMERICAN ECONOMY: A DOCUMENTARY HISTORY 1675 TO 1929}, at 14-15 (1976) (collection of essays showing how often “normal” single women worked to help their families). Lower class female occupations such as carding, spinning, and weaving were transferred from home to factory, while for middle class women, newly gained time allowed them to become “ladies.” Gerda Lerner, \textit{The Lady and the Mill Girl: Changes in the Status of Women in the Age of Jackson}, in \textit{OUR AMERICAN SISTERS: WOMEN IN AMERICAN LIFE AND THOUGHT} \textuuml;82, 89 (Jean E. Friedman et al. eds., 4th ed. 1987) [hereinafter \textit{OUR AMERICAN SISTERS}].

\textsuperscript{58} \textit{See, \textit{e.g.}}, DUBLIN, \textit{supra} note 57, at 4 (women in cottage industries); Joan Wilson, \textit{The Illusion of Change: Women and the American Revolution}, in \textit{OUR AMERICAN SISTERS}, \textit{supra} note 57, at 76 (arguing that women were valued as equal economic partners because of the severe labor shortage in the American colonies). However, by the mid-nineteenth century, the working alternatives were rather dismal:

Meantime, domestic service—disgraced, on one side, by the stigma of our late slavery, and, on the other, by the influx into our kitchens of the uncleanly and ignorant—is shunned by the self-respecting and well educated, many of whom prefer either a miserable pittance or the career of vice to this fancied degradation. Thus comes the overcrowding in all avenues for woman’s work, and the consequent lowering of wages to starvation prices for long protracted toils . . . . Factory girls must stand ten hours or more, and consequently in a few years debility and diseases ensue, so that they can never rear healthy children.

\textit{BEECHER & STOWE, supra} note 34, at 570.

\textsuperscript{59} \textit{AMERICAN DOMESTICITY, supra} note 44, at 217. \textit{See also} Martha Minow, \textit{“Forming Underneath Everything That Grows:” Toward a History of Family Law}, 1985 Wis. L. Rev. 819 (discussion of Beecher along with several other “unnoticed” early American women whose lives provide a backdrop for much of American legal history). After reading a good deal of her writing and several books written about her, I am convinced that Beecher’s choice of an apparently subordinated position for women was correct. It was entirely rational for married women in the nineteenth century to stay out of the labor market. Beecher’s movement undoubtedly sowed the seeds of the ultimate sexual revolution, since it stressed higher education for women. Although physically she could not compete with her husband in the factories of the nineteenth century, an educated women is now very competitive in the information-based economy of today, one and a half centuries later.

John Stuart Mill, in his famous \textit{SUBJECTION OF WOMEN}, first published in 1869, criticized the political authority of men over women. Yet he did not suggest that the married woman work outside the home, for:

If, in addition to the physical suffering of bearing children, and the whole responsibility of their care and education in early years, the wife undertakes the careful and economical application of the husband’s earnings to the general comfort of the family; she takes not only her fair share, but usually the larger share, of the bodily and mental exertion required by their joint existence. If she undertakes any additional portion, it seldom relieves her from this, but only prevents her from performing it properly . . . . In an otherwise just state of things, it is not, therefore, I think, a desirable custom, that the wife should contribute by her labour to the income of the family.

quired higher education and were particularly suited to those women who chose never to marry.  

Regan is entirely correct, however, when he states that "work by the husband was a responsibility owed to the wife, and nothing more detrimental could be said about a man than that he did not support his wife and family." Nonsupport was such a grave offense that many states made it a cause of action for divorce.

As Regan notes, the new role identification which defined distinct spheres for husbands and wives also fostered the couple's duty to maintain emotional bonds. In marriage, couples needed to transcend themselves and their own wants. By investing marriage with traditional religious symbols of selflessness, marriage in one sense returned to its original sacramental status. This sacramental view offered a vision of connection during a period when rapid industrialization caused real individual anxiety. Regan uses the example of the "ministerial" letters written by Harriet Beecher Stowe to her husband, himself an evangelical clergyman. In constantly urging him to spend more time examining his own conscience and working towards self-purification, Stowe revealed her own strong religious background.

B. Individuality and Self

In the chapters that form the heart of his book, Regan argues that focusing on individual choice affects not only our families, but

60 Catharine Beecher made this choice after her fiance, a Yale science professor, died in a shipwreck. AMERICAN DOMESTICITY, supra note 44, at 37. She wrote, "no woman is forced to obey any husband but the one she chooses for herself; nor is she obliged to take a husband, if she prefers to remain single." BEECHER, supra note 32, at 3.

61 REGAN, supra note 3, at 28 (quoting ROBERT GRISWOLD, FAMILY AND DIVORCE IN CALIFORNIA, 1850-1890, at 101 (1982)).


63 REGAN, supra note 3, at 30.

64 Marriage was demoted from a sacrament to a favored institution by Martin Luther and the reformers, such as John Calvin, who followed him. JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 553 (1987). As Catharine Beecher wrote: "Now the family state is instituted to educate our race to the Christian character . . . to train the young to be followers of Christ, Woman is its chief minister, and the work to be done is the most difficult of all . . . ." CATHARINE BEECHER, WOMAN'S PROFESSION AS MOTHER AND EDUCATOR WITH VIEWS IN OPPOSITION TO WOMAN SUFFRAGE 175 (1872). See Lindley, supra note 36, at 328 (discussion of Beecher's view of the family).

65 REGAN, supra note 3, at 32.

66 Harriet was the daughter of Lyman Beecher, a Calvinist Evangelical minister. All her brothers were ministers, and she married one. Gerald Carson, CATHARINE BEECHER, 5 NEW ENG. GALAXY 3 (1964).
also our very selves. He begins by noting that in the twentieth century, private means personal, not family-related.\textsuperscript{67} Because “private” means “personal,” a much more subjective term, family law no longer embodies a moral vision\textsuperscript{68} but instead aims to prevent harm to family members.\textsuperscript{69} There is no consensus about standards of behavior in families. Instead, we see a person as an individual, not as husband or wife, parent or child.\textsuperscript{70}

This individual member of a modern family may no longer enjoy many of the functions that the family used to provide\textsuperscript{71} because the family is no longer the repository of shared culture. For example, before about 1920, the family was the site of courtship.\textsuperscript{72} The family served a role besides “‘gratifying people’s psychological needs,’”\textsuperscript{73} because serious young couples sought parental approval before considering marriage.

\textsuperscript{67} REGAN, supra note 3, at 34-39. This trend toward subjectivity can also be seen in the modern business firm. While in the late nineteenth and early twentieth centuries businesses were often identified with families, they have recently become much more impersonal. \textit{See, e.g.}, ALFRED D. CHANDLER, JR., SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM 291-95 (1990) (noting that the family association still characterizes British, as opposed to American and German, firms); Yoram Ben-Porath, \textit{The F-Connection: Families, Friends, and Firms and the Organization of Exchange}, 6 POPULATION & DEV. REV. 1 (1980) (discussing the role of transactions in identity).


\textsuperscript{69} REGAN, supra note 3, at 36.

\textsuperscript{70} \textit{Id.} at 39. \textit{See also} Schneider, supra note 68, at 500-01 (models of marriage and parenthood). I agree with this analysis up to a point. For example, in asserting their individual identities as apart from their husbands, many married women have moved from “Mrs. John Smith” to “Nancy Smith” and, more recently, to “Nancy Jones” (using the maiden name or birth surname). \textit{See, e.g.}, Stuart v. Board of Supervisors of Elections, 295 A.2d 223 (Md. 1972) (married woman filed petitions challenging action of county board of elections canceling her registration to vote using her maiden name); Lassiter-Geers v. Reichenbach, 492 A.2d 303 (Md.), \textit{cert. denied} 474 U.S. 1019 (1985) (suit subsequent to divorce to determine the surname of parties’ child).

\textsuperscript{71} REGAN, supra note 3, at 53.

\textsuperscript{72} \textit{See} BETH L. BAILEY, \textit{FROM FRONT PORCH TO BACK SEAT: COURTSHIP IN TWENTIETH-CENTURY AMERICA} (1988) (describing how “calling” became dating, a practice undertaken almost exclusively outside the home setting, which focused to a greater extent on materialism); \textit{see also} Willard Waller, \textit{The Rating and Dating Complex}, 2 AM. SOC. REV. 727, 729-30 (1937) (discussing the dating hierarchy of an anonymous college).

\textsuperscript{73} REGAN, supra note 3, at 53 (quoting B. ADAMS, \textit{THE FAMILY: A SOCIOLOGICAL INTERPRETATION} 95 (1975)). \textit{See also} TREATISE ON FAMILY, supra note 31, at 237-42 (describing the mutual help and insurance against a risky world that took place across generations in extended families).
The modern person, as Regan puts it, links happiness with consumption. He reflects about how we use the term "lifestyle," drawn from the inherently transitory fashion world. The use of the term suggests that we have made relationships contingent. Like participants in the futures market, we always look for a hedge in case a better opportunity comes along. As Regan notes, our reliance on the family to gratify psychological needs holds the seeds of its own destruction. We ground the family upon "inherently dynamic emotional states." Since our emotions are not constant, Regan predicts that spouses who can will discard their present spouses for presumably more attractive opportunities.

In a provocative paper, art historian Marian Wardle contrasts portraits of nineteenth- and twentieth-century man. Marian Wardle, "Domestic Bliss" Versus "Domestic Blitz": The Family in American Art in the 1890s and 1990s, Paper presented at the International Society for Family Law North American Conference, in Moran, Wyoming (June 12, 1993) (on file with author). Like Regan, Wardle notes that, while the nineteenth-century paintings embodied the concept of the ideal family as the Utopian retreat, the twentieth-century photographs portray "a man alone, confronting his loneliness and isolation" while surrounded by consumer goods, or a "daughter [who] has broken away from her mother, although they both occupy the same domestic space." Id. Regan, supra note 3, at 62-63.

A few years ago, I examined a computer program called "Personal Lifestyles." The software purported to allow couples to design their own cohabitation and antenuptial contracts. It was particularly designed for unorthodox relationships: gay and lesbian couples, "open marriages," and the like.

The family then becomes little more than a long term contract subject to the threat of "efficient breach" should the emotional life not seem satisfactory. See generally Ian R. Macneill, Efficient Breach of Contract: Circles in the Sky, 68 Va. L. Rev. 947 (1982) (discussing problems in efficient breach theory); Alan Schwartz, The Case for Specific Performance, 89 Yale L.J. 271 (1979) (arguing that specific performance should be a readily available remedy for a breach of contract).

The same repugnance that many law students feel about cavalierly discarding contractual obligations where the original promisee is paid off somehow has not carried over to marriages, except, perhaps, to the serial monogamy practiced by some Hollywood stars. Economists Martin Zelder and Douglas Allen suggest that no-fault divorce may provide more efficient exodus from less-than-satisfactory marriages. Martin Zelder, Inefficient Dissolutions as a Consequence of Public Goods: The Case of No-Fault Divorce, 22 J. Legal Stud. 503 (1994); Martin Zelder, The Economic Analysis of the Effect of No-Fault Divorce on the Divorce Rate, 16 Harv.J.L. & Pub. Pol. 241 (1993) (arguing no-fault divorce will increase divorce rate, particularly among families who spend a higher proportion of their incomes on their children); Douglas W. Allen, Divorce: What's at Fault For No-Fault?, Presentation to the Canadian Law and Economics Association, in Toronto (Aug. 1992).

Indeed, two economists have separately written about the "trophy wife" phenomenon: the wealthy businessmen who discards his wife of many years to marry a much younger, and presumably more attractive woman. See William Bishop, Is He Married? Marriage as Information, 34 U. Toronto L.J. 245 (1984); Lloyd Cohen, Marriage, Divorce and Quasi-Rents; Or, "I Gave Him the Best Years of My Life", 16 J. Legal Stud. 267 (1987). Jack Kent Cooke, owner of the Washington Redskins football team, has achieved notoriety for his series of much younger wives. See Kitty Kelley, My Life With Jack, Washingtonian, Aug.
C. Status, Self and Community

Regan carries his analysis further than claiming that postmodernism threatens only the family. He states that the self in the postmodern world is redefined so as to be perpetually transforming, perpetually choosing.\(^8\) Although we seek happiness, in Regan's postmodern world we are paradoxically doomed to eternal striving for elusive perfection. Status offers an opportunity for happiness precisely because it restrains the "free play of subjectivity."\(^8\) The definition of roles that status provides therefore does not fetter, but rather frees us.

Within the family, Regan suggests that status "proclaims that some things can be taken for granted as long as a marriage lasts, and that some obligations may remain even when a partner has decided to leave."\(^8\) In other words, there must be enough content in marriage that a spouse can rely on some things being constant throughout. Some obligations, such as civility, coparenting, and financial support, may remain even when one partner has decided to end the legal marriage.\(^8\) The self is thus defined not in terms of choice, but in terms of relationship to others.\(^8\)

Paradoxically, "status . . . enhance[s] the potential for intimacy precisely because it is impersonal."\(^8\) It contributes to the creation of a unified self capable of making commitments and inspiring trust. Status uses communal obligations to root the self in context, and thus

1988, at 78 (picture of Jack and Jack Junior, both with "trophy wives"); see also Kozlowski v. Kozlowski, 493 A.2d 902, 905 (N.J. 1979) (cohabitant abandoned his partner for a "trophy wife" 30 years his junior).

81 Regan, supra note 3, at 77. Regan argues that "[m]odernism envisions the authentic self as a person defined by her capacity for growth and her receptivity to new experience." Id. One is reminded of the mythological travails of Sisyphus and his unhappy reincarnation in Albert Camus's Le Mythe de Sisyphe: Essai sur l'Absurde (1942), because reward and human dignity is found in effort and process, rather than progress.

82 Regan, supra note 4, at 83. Here I think of St. Paul's passage in Galatians 5:1 that by being in bondage to Christ, the Christian finds the greatest liberty: "Stand Fast therefore in the liberty wherewith Christ has made us free, and be not entangled with the Yoke of bondage."

83 Regan, supra note 3, at 96. This, of course, protects those willing to make intimate commitments. My colleague Lloyd Cohen reminds me of the scene from "Fiddler on the Roof" in which Tevye asks Golda, his wife of many years, whether she loves him. Paraphrasing her reply, she acts as though she loves him whether the emotion is there or not. This corresponds with Regan's comment that "conduct reflecting interdependence is often the best evidence of the partners' expectations." Id. at 125. See also infra notes 166-69 and accompanying text.

84 Regan, supra note 3, at 96. Regan argues that a view of the self in contract is acontextual. Id. at 90 (citing Lawrence Friedman, Contract Law in America 20-21 (1965)). The "pure" theory of contract is grounded on the capacity to make a choice free of any external restraints. Id. Even inequalities of bargaining power are merely the result of prior individual choices rather than restraints on choice. Id. at 91.

85 Id. at 102.

86 Id. at 104 (referencing George H. Mead, Mind, Self, and Society (1934)).
locates the self within forms of life in which it can act meaningfully as an agent.

Having persuaded us that seeing the family in terms of status is important, Regan continues by enlarging the definition of family. He maintains that "the moral aspiration that marriage has expressed is not heterosexual intimacy per se, but the more general vision of responsibility based on the cultivation of a relational sense of identity." In particular, in Chapter five, Regan extends the protection of intimacy to same-sex relationships. For Regan, the primary relational values are intimacy and stability. He therefore would extend the benefits of status to same-sex relationships while removing it from unmarried cohabitation. However, he suggests that because stability and intimacy are more prevalent in marriage, legal rules ought to clearly distinguish between marriage and cohabitation: "A new model of status would be sympathetic to the claim that the social interest in promoting marriage justifies preserving a firm distinction between the legal treatment of married and unmarried couples." Cohabitation is frequently preferred because it avoids the obligations of marriage. Since women in long term relationships have tended to rely less on their own market incomes, and have invested more than their partners in "household production," allowing cohabitation to replace marital obligations would also have a gendered impact. Regan would

87 Id. at 120.
88 Id. at 121. Regan notes the desire of many same-sex couples to cement their relationship through formal "commitment ceremonies." See, e.g., Susan Reed, et al., Love Match No More, PEOPLE MAGAZINE, July 8, 1991, at 28 (videotaping of cohabitation contract between Martina Navratilova & Judy Nelson).
89 Id. supra note 3, at 173.
90 Id. at 122-28. Unmarried cohabitation arrangements tend to be less stable than married ones, precisely because the partners do not wish to undertake the commitments of marriage. Id. at 123. Regan would, in line with most modern jurisdictions, allow unmarried cohabitants to enforce their express agreements. Id. at 125.
91 Id. at 123. See also Schneider, supra note 68, at 514-20 (describing the channeling function family law could play in modern institutions of marriage and parenthood).
92 Regan, supra note 3, at 124-25. Interestingly, all of the often-cited palimony cases have been brought by women. See, e.g., Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (suit by woman against man with whom she lived to enforce oral contract to distribute property); Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979) (suit brought by woman for equal division of property acquired during time of cohabitation); Kozlowski v. Kozlowski, 403 A.2d 902 (N.J. 1979) (suit by female cohabitor against man with whom she lived for 15 years for future support and payment for services rendered); Morone v. Morone, 413 N.E.2d 1154 (N.Y. 1980) (suit by woman to enforce oral contract for performing "housewifely" duties). Regan's argument thus runs counter to that of Herman Hill Kay and Carol Amyx, who suggest that "social planners should turn their attention to the possibility of creating and strengthening institutional support for individuals entering into family relationships, whether or not these relationships are marital ones." Herman Hill Kay & Carol Amyx, Marvin v. Marvin: Preserving the Options, 65 CAL. L. REV. 937, 975 (1977).
give incentives to marry by encouraging the idea that obligation in certain instances can arise from the fact of relationship itself.\footnote{93}{REGAN, supra note 3, at 126.}

D. Regan’s Test of the Status Model

At this point, Regan uses his analysis of intimacy to discuss current issues in family law, specifically spousal rape and presumptions of legitimacy.\footnote{94}{Id. at 129-37.} He argues that courts and legislatures err when they treat marital rape with less gravity than sexual assault by strangers.\footnote{95}{Id. at 130.} In fact, he points out that the injury resulting from marital rape may be greater than that resulting from other rapes because of the betrayal of trust and exploitation of the wife’s vulnerability.\footnote{96}{Id. at 129-31.}

Regan then turns to a discussion of presumptions of legitimacy, defending the Supreme Court’s decision in \textit{Michael H. v. Gerald D.}\footnote{97}{491 U.S. 110 (1989).} At the time, California presumed a child in wedlock to be the legitimate child of the husband and wife. In \textit{Michael H.}, however, the child was not the biological child of the husband but rather of the wife’s lover. The Supreme Court upheld California’s conclusive presumption of legitimacy, even where it precluded the married woman’s lover from establishing his paternity.\footnote{98}{Id. at 131-37.} Regan supports this decision by reasoning that the husband’s willingness to raise the child expressed a commitment both to the child and to his marriage.\footnote{99}{Id. at 134.} A paternity presumption respects this commitment by insulating spouses and the marriage from having to deal with the adulterous third party. Putting the father in his model, Regan notes that the natural father was an
“acontextual rights-bearer” because he sought to “vindicate his own interest” despite the “web of relationships” affected by his actions.\(^\text{100}\) In Regan’s view, the individual rights approach advocated by the dissent in \textit{Michael H.} was thus “insensitive to the complex layers of interdependence that characterize these intimate relationships.”\(^\text{101}\)

Regan next considers whether no-fault divorce laws threaten marital intimacy.\(^\text{102}\) He notes several problems: that the bitterness of divorce disputes may simply transfer to other things such as property division, payment of support, or custody and visitation;\(^\text{103}\) that divorce may cause opportunism during the marriage;\(^\text{104}\) and that divorce sends a bad “message that society is indifferent about marital misconduct.”\(^\text{105}\) Regan concludes that most couples would agree on minimal standards of marital conduct.\(^\text{106}\) The option of a fault-based divorce should be available when a spouse feels that a genuine abuse of trust

\(^{100}\) \textit{Id.} at 135. The “rights” approach, as opposed to viewing the family as a whole, is criticized by Schneider, \textit{supra} note 1, at 1858.

\(^{101}\) \textit{Id.} at 135. The same result can be reached by looking not at the commitment of the husband who wishes to raise the child (or his desire not to “deal with the third party”), but rather at the perspective of the child. Most children would thrive better in a stable two-parent family than in an unusual relationship with two father figures. Many of the crises in child abuse, foster care, and adoption might be alleviated if we focused less on the rights of parents, important though they undoubtedly are, and more on the risk of harm to children. Surely abuse of children in a family setting is just as vital of trust and exploitative of vulnerability as is marital rape. \textit{See generally} Margaret L. Egginton & Richard E. Hobbs, \textit{Comment, Termination of Parental Rights in Adoption Cases: Focusing on the Child}, 14 \textit{J. Fam. L.} 547, 550-58 (1975-76) (discussing what is meant by the “best interests of the child”). Courts, and particularly the Supreme Court, seem focused on parental rights at the expense of children’s. \textit{See}, e.g., \textit{Smith} v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977) (review procedure for administrative decisions to transfer children from foster homes not constitutionally deficient simply because it is available only at foster parents’ request; children’s due process interest is small because “it is difficult to see what right or interest of the foster child is protected by holding a hearing to determine whether removal would unduly impair [a child’s] emotional attachments to a foster parent who does not care enough about the child to contest the removal”); \textit{May} v. Anderson, 345 U.S. 528 (1953) (custody decrees from court without personal jurisdiction over a parent do not require “full faith and credit” personal jurisdiction is required “to deprive [a] mother of her personal right to . . . immediate possession” of her children); \textit{In re Clausen}, 501 N.W.2d 193 (Mich. Ct. App. 1993) (Michigan court has no jurisdiction to intervene in a custody dispute and must honor an Iowa court order, notwithstanding the Iowa court’s failure to analyze the “best interests of the child”).

\(^{102}\) \textit{Regan, supra} note 3, at 137-43.


\(^{104}\) \textit{Id.} at 139 (citing Margaret F. Brinig & Steven M. Crafton, \textit{Opportunism in Marriage}, 29 \textit{J. Legal Stud.} 869 (1994)). In this study we suggest that creating divorce laws where fault is irrelevant for any purpose may lead to fewer and later marriages, reduced investment in children, and more negative behavior such as spouse abuse. \textit{See also} \textit{TREATISE ON FAMILY, supra} note 31, at 229-34 (arguing that no-fault divorce and efficient bargaining by husbands and wives suggest that no-fault will hurt wives and children whose marriages are broken up by their husbands).

\(^{105}\) \textit{Regan, supra} note 3, at 140.

\(^{106}\) \textit{Id.}
has occurred because these minimal standards were violated. For example, instead of allowing the torts system to redress physical injuries, Regan suggests that the courts levy a financial penalty through property and support determinations because in divorce "the marriage as a whole is already under review." Regan suggests that the "clean break" approach to divorce, one that involves property division rather than alimony, also has problems. Even the more recent focus on human capital investment by spouses is flawed because it focuses on "implicit costs and benefits of each spousal interaction." A human capital approach therefore "emphasizes voluntary rather than relational obligation." The spouse who is flexible in "enforcing" the original expectation, rather than using some tit-for-tat strategy, has difficulty signaling that marital obligations must be met in the future.

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107 Id. at 141. For example, New York provides for fault-based divorce on several grounds, including cruel and inhuman treatment, abandonment and adultery. See N.Y. Dom. Rel. Law § 170 (McKinney 1988).

108 REGAN, supra note 3, at 143. This coincides with Steve Crafton's and my recommendations, and those of the-then President of the American Bar Association Family Law Section. See Brinig & Crafton, supra note 104, at n.128; Harvey Golden & Michael Taylor, Fault Enforces Accountability, 10 Fam. Advoc. 11 (1987).


111 REGAN, supra note 3, at 150. This is also a problem in other long-term relational contracts. Once parties form a commercial contract and accept any nonconforming goods or deviations from time schedules accepted, it is difficult to change behavior midstream. See U.C.C. § 2-609 (1978) (insecure party may demand assurances of performance).

For examination of the tit-for-tat strategy, see Erin O'Hara, Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis, 24 Seton Hall L. Rev. 736.
Chapter six of Regan's book effectively deals with objections to his use of status. He anticipates two criticisms: first, that revival of status will reinforce gender stereotypes and artificially intrude into a realm that should be spontaneous; and second, that revival of status will be ineffective in shaping behavior.

Regan surmises that critics will raise the objection that status will present an artificial intrusion into a realm that should be spontaneous. Much of the book's earlier discussion demonstrates his reluctance to place families at the whims of emotional states. In this section of the book he argues further that even what we label as nonvolitional emotions can be affected by group behavior or context. A person "must conceptually organize her sensory experience into a meaningful pattern before she can properly be said to experience an emotion." If emotion is always experienced through the filter of culture, we are mistaken to assume that we can protect a "natural" realm of emotions from the intrusion of artificial influences. As Regan puts it, the "question that confronts us is what context to choose."

Regan next addresses the objection that law cannot affect behavior. He argues that law does affect incentives and expectations. Even though not all people are moved by the law, it does affect the behavior of those people who are "at the margin." When social expectations, codified in laws, render certain types of behavior expensive, fewer people will engage in them. Regan notes, as has Elizabeth

114 Regan, supra note 3, at 154-84.
115 Id. at 154.
116 Id.
117 Id. at chapters 5 & 6.
118 Id. at 169-70. Regan cites significant social science literature to support his theory. In addition to his authorities, see Robyn Dawes et al., Cooperation for the Benefit of Us—Not Me, or My Conscience, in BEYOND SELF-INTEREST 97 (Jane J. Mansbridge ed., 1990).
119 Regan, supra note 3, at 170.
120 Id. at 173.
121 Id.
122 Id. at 174.
123 Id. at 176. The argument has the greatest force if people do not accurately predict their own behavior. See Lynn A. Baker & Robert Emery, When Every Relationship is Above Average: Perceptions and Expectations of Divorce At the Time Of Marriage, 17 LAW & HUM. BEHAV. 439, 444 (1993) ("[T]he most striking finding from the survey of marriage license applicants was the discrepancy between their relatively accurate knowledge of the base rates of divorce and its consequences and their disregard of these base rates when making projections about their own futures.").
124 This is an important contribution of the law and economics movement, and is directly based upon the law of supply and demand. For example, Gary Becker has argued that criminal punishments, and especially fines, do in fact deter some criminal behavior. Gary Becker, Crime and Punishment: An Economic Approach, 76 J. POL. ECON. 169 (1968). See also A. Mitchell Polinsky & Steven Shavell, The Optimal Use of Fines and Imprisonment, 24 J.
Scott, that some divorces are triumphs of short-term desires over long-term preferences for commitment. He continues with Scott's argument that the socially preferable result becomes more attractive if laws require mandatory delays before divorce or financially disfavor some divorce plaintiffs. Scott argues that "current divorce law vindicates a vision of marriage as an arrangement for individual gratification to which each partner makes a limited commitment." In the end, Regan concludes that family law may not matter because of these incentive-shaping effects. Rather, the law may encourage internalization of a different morality. Returning to his now familiar theme, Regan repeats that family status may create an individual "whose freedom of action is circumscribed by one's relationship to others."

In his conclusion, Regan assures us that the family has the "capacity to encourage the kind of human caring and sense of mutual responsibility for which the contemporary world cries out." He speaks particularly to fathers, and reminds us that fatherhood is not a role from which one can opt out. He argues that "the role of father needs to be regarded... as part of who a man is, not as something that he might perform when he feels like it."

As Regan puts it, we might use family law to promote child welfare, not only by directly intervening in cases of harm, but also by "fostering a substantive vision of family life that makes a father less likely to inflict harm." He concludes by reconsidering the Victorians who, despite their faults, recognized the need for deep-rooted communal responsibility. Perhaps even more than the Victorians, modern Americans need to have homes and families to which to return because our "outside" life is so fragmented. Yet, unlike our nine-

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125 REGAN, supra note 3, at 175 (discussing Elizabeth S. Scott, Rational Decisionmaking About Marriage and Divorce, 76 Va. L. Rev. 9 (1990)).

126 Id.

127 Id. Lloyd Cohen argued that without the punishment for marital misbehavior afforded under the fault system, the spouse with the least to lose from divorce would behave opportunistically. Cohen, supra note 1, at 274-77. Steve Crafton and I tested this proposition empirically, and found it to be true. Brinig & Crafton, supra note 104, at 883-92.

128 REGAN, supra note 3, at 181.

129 Id.

130 Id. at 183.

131 Id. at 187 (citation omitted).

132 Id. at 188.

133 Id.

134 Id.

135 Id.
teenth-century counterparts, we tend to conclude that "there is no true place to which to return, no home now; if there ever was."\textsuperscript{136}

Regan also points out the similarities between critics of relational feminism (or the feminism of difference) and critics of his status approach.\textsuperscript{137} Critics of both relational feminism and status suggest that "a focus on the similarity between men and women is likely to be more successful in eradicating gender inequity."\textsuperscript{138} As Regan notes, however, "women have suffered not because the adoption of a relational ethic is misguided, but because in important ways the culture has de-valued that ethic."\textsuperscript{139} He notes that eventually the adoption of an ethic of status will require a change in our self-image.\textsuperscript{140} 

\textquotedblleft[T]he result will be a conception of identity for both men and women that sees the demands of freedom and relationship as complementary rather than antagonistic."\textsuperscript{141} A reconstruction of our model of identity would account for differences by insisting that we "recognize the full range of human experience, and that we give at least as much weight to a relational ethic as we traditionally have given to an ethic of independence."\textsuperscript{142} Regan argues that a new model of status would demand "that those who typically enjoy more power within intimate relationships must be accountable to those who are more dependent."\textsuperscript{143}

II

FROM STATUS TO CONTRACT TO COVENANT

One criticism of Regan's book is that he is too apologetic about his use of "status." Few of us would want to eradicate the concept

\textsuperscript{136} Id. (quoting Richard Sennett, \textit{Fragments Against the Ruin: Coping with an Unbounded Present}, \textit{Times Literary Supplement}, Feb. 8, 1991, at 6).


Of course, relational feminism depends upon women being psychologically or morally different from men in meaningful ways. I am attempting currently to show this difference in terms of altruism and risk aversion. Margaret F. Brinig, \textit{Comment on Jane Singer's Specialization and Efficiency}, 82 Geo. L.J. (forthcoming 1994).


\textsuperscript{139} Regan, \textit{supra} note 3, at 155. See, e.g., Karen Czapanskiy, \textit{Volunteers and Draftees: The Struggle for Parental Equality}, 38 UCLA L. Rev. 1415, 1451-57 (1991) (suggesting that in terms of their behavior as parents, society views women as being good parents out of a sense of obligation, while men are to volunteer if they perform the same job).

\textsuperscript{140} Regan, \textit{supra} note 3, at 160.

\textsuperscript{141} Id. at 162.

\textsuperscript{142} Id. at 164.

\textsuperscript{143} Id. at 165.
entirely from American usage. Status clearly has value when we speak of children, when we try to describe the basis of jurisdiction for divorce, or when we talk in terms of a “discrete and insular minority” that should be given special protection under the law. While Regan’s hesitation is understandable, a different paradigm would alleviate his qualms and still reinvigorate our idea of the family.

Regardless of whether we believe that status evokes sexism or racism, status does remind us of hierarchy. While position may continue to be an important part of the parent-child relationship, hierarchical notions do not fit well with our modern ideal of matrimony as a union of two equals. Covenant, on the other hand, is a concept that is gender and color neutral. The human parties to a covenant may enjoy horizontal equality. However, unlike parties to a contract, they are not interested in fairness, but rather are willing to give beyond what is fair. Like Regan’s notion of family in the context of status, the family under the rubric of covenant extends beyond

146 For example, it is somewhat troublesome to use concepts of contract when speaking of status relationships. See, e.g., Gary Becker & Nigel Tomes, Human Capital and the Rise and Fall of Families, 4 J. LAB. ECON. 1 (1986) (using an economics model to chart the decline of human capital in families); Gary S. Becker & Kevin M. Murphy, The Family and the State, 31 J.L. & ECON. 1 (1988) (regulation of family leads to more efficiency, unlike conventional contracts). It is difficult to resurrect the Victorian term, with its roots in religious revival, without their religious connotations as well. In Regan’s world, religion does not apparently perform an important role. For example, it is largely religious groups that have objections to same-sex relationships. For example, the churches of the District of Columbia for years have fought against repeal of the criminal sodomy statutes. Rene Sanchez, D.C. Sodomy Law Is Off the Books; Congress Allows Repeal, Ending 12-Year Battle by Gay-Rights Advocates, WASH. POST, Sept. 18, 1993, at B3.
147 Covenant relationships can be horizontal, as with husbands and wives who share mutual obligations and benefits. Moore, supra note 6, at 171. Covenants may also be unequal partnerships “in which the power and authority of the covenantal partners is asymmetrical as are the responsibilities, obligations and rewards.” STEVEN T. KATZ, JEWISH IDEAS AND CONCEPTS 156 (1977). The more hierarchical relationship in the family is that between parent and child, although this contains elements of reciprocity as well. Even while minors, children owe their parents obedience and affection in return for the support, guidance and education the parents provide. Once the parents become aged and disabled or otherwise disadvantaged, children have a moral (and sometimes a legal) responsibility to care for the parents. See Margaret F. Brinig, Limited Horizons: The American Family, 2 INT’L J. OF CHILDREN’S RIGHTS 293 (1994).
148 This may be why spouses are unable to sue for support while in the marriage or when they thought they were married. See, e.g., Cooper v. Cooper, 17 N.E. 892 (Mass. 1872); Alexander v. Kuykendall, 63 S.E.2d 746, 747 (Va. 1951). Both cases indicate that marital services are performed out of love rather than out of hope for reward. The Biblical parallel is to God’s generosity even when what we are given, or what we accomplish in return, may not be equal. See, e.g., Matt. 20: 1-16 (laborers in the vineyard all paid the daily wage, even though they began at different times); see also Moore, supra note 6, at 172 (citing Jon D. Levenson, Covenant and Commandment, 21 TRADITION 42, 50 (1983) (discussing Hebrew view of covenant between God and Israel, as expressed in the book of Joshua)).
the nuclear arrangement. It includes such close relatives as grandparents and, ultimately, the whole community. 149

Both status and contract have their roles in Regan's vision of the family. Similarly, I do not believe a concept of covenant always misplaces a contract or law and economics analysis. Some aspects of families make little sense without contractual analysis. For example, the bargaining that takes place at the time of divorce or during antenuptial and separation agreements speaks more to contract than to a status or covenant. 150 Furthermore, unless a private welfare mentality explains alimony, it is difficult to rationalize in a no-fault system without looking at marriage through a contractual or law and economics lens. 151

Covenant, even better than status, explains why some aspects of marriage and parenthood cannot be varied by contract. 152 For example, spouses cannot contract around marriage's infinite duration, 153 nor can they avoid mutual support during the marriage. 154 Similarly, parents cannot avoid entirely the duty of child support. 155 Even when the minor child marries or moves in with a boyfriend, the parent's duty to support may revive if the child becomes indigent. 156 Even though divorce severs most marital obligations, many states require spouses divorcing insane partners to continue their support obligations. 157

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149 As Everett states, "[p]arenting should be the project, indeed, the covenant, of a whole community." Everett, supra note 15, at 567. Moore points out that covenant "offers possibilities for recontextualizing, and thus redefining, self-actualization through decision-making and action." Moore, supra note 6, at 170. She suggests that "[f]eminists and other critical theorists should attend particularly to extracting the [covenant] paradigm's emancipatory focus on equality and the common good." Id. Implicit in Moore's view is a commitment to social generation of norms. Id. at 186-96. Cf. Katharine T. Bardett, Feminist Legal Methods, 103 HARV. L. REV. 829, 886 (1990) (calling for celebration and nurturing of universal human dignity).


151 See, e.g., Brinig & Carbone, supra note 41; Carbone & Brinig, supra note 39; Cohen, supra note 1.

152 See, e.g., Reid v. Reid, 429 S.E.2d 208, 211 (Va. 1993) (no restitution of alimony paid under invalid decree).


The strict law and economics view of such terms is that non-contractual obligations are default or off-the-rack provisions, or that they substitute for what parties wanted ex ante. However, since both the parties in question may not want these obligations, even ex ante, law and economics does not completely answer the objection. Some parts of family life, which I would attribute to covenant, are invariable because they are necessary for the family to meet its historical and present-day societal obligations. They make the family what it is: a set of relationships where intimacy and interdependence flourish. Covenant thus explains, at least in part, why moving family law too much toward individuality has large negative consequences.

Anticipating another objection, I also believe that the law is partly aspirational. Although covenant, like contract or status, provides only part of the picture for family law, it can guide our decisionmaking, particularly in the legislative sphere. In other words, before we reform laws, we need to look both at the incentives the new laws will give and at the type of people they will ultimately shape. Before we undertake family law reform on any large scale, we need to take a hard look at the family in this aspirational sense.

Covenant, in the sense I will use it here, describes a relationship characterized by a special kind of love: one that is boundless and

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159 Cf. Becker & Murphy, supra note 146 (arguing that many state obligations to family intervention mimic the agreements that would occur if children arranged their own care).

160 This may be similar to the general contracts concept of unconscionability, which has inspired a vast literature. See, e.g., Alan Schwartz, Unconscionability and Imperfect Information: A Research Agenda, 19 Can. Bus. L.J. 437 (1991).

161 In economic terms, these create positive externalities, or public goods for people outside the family.

162 See, e.g., Brinig & Crafton, supra note 104.

163 See, e.g., Schneider, supra note 68, at 498 ("Law's expressive abilities may be used, first to provide a voice in which citizens may speak and, second, to alter the behavior of people that law addresses.").

164 I am pleased to see that the American Bar Association Section on Family Law is doing so. One of its subcommittees, the Committee for the Reconsideration of Family, is preparing a book length study of family law.

165 The Random House Dictionary of the English Language defines "covenant" as:

1. An agreement, usually formal, between two or more persons to do or not do something specified . . .

4. (cap.) Hist.
   a. See National Covenant.
   b. Solemn League and Covenant.

5. Bible a. the conditional promises made to humanity by God, as revealed in Scripture.

6. Law a. a formal agreement of legal validity, esp. one under seal . . .
The person in a covenant relationship expects, with justification, that it will go on forever. The intimacy that Regan seeks flows naturally with this kind of love. Unlike the recent Longines Christmas ads in which the donee always expects something more, the person in covenant is pleased by what the other gets. The emphasis is upon giving rather than receiving, upon enjoying the gifts of others rather than reveling in one's own. Covenant, then, describes altruism in the framework of relationship. This is quite different from economist Gary Becker's definition of altruism, which he derives from a single family member's caring. In addition to requiring only one party, rather than the two or more needed for covenant, Becker's definition of altruism implies that the altruist must have the means to withdraw support from the rest of the family.

In a legal sense, a covenant frequently is an especially solemn type of contract, one that cannot be broken without significant penalties. A covenant, or promise under seal, will support a gift to a third party where a simple contract would not. Covenant implies donative intent and confers a benefit upon another. Each party will always act for the other's good regardless of his or her behavior. Accordingly, once the parties make their initial assents, much of their relationship, which becomes constitutive of their identities and so inherently valuable. The Puritans, Cotton Mather, John Cotton, and John Winthrop, organized their Massachusetts colony around their collective covenant. Everett, supra note 15, at 561. The covenant was not just among the Puritans, but included God as well. "Thus stands the cause betwenee God and us. Wee are entered into Covenant with him for this worke ...." Moore, supra note 6, at 160 (quoting John Winthrop, A Modell of Christian Charity, in 2 WINTHROP PAPERS 292, 294 (Massachusetts Historical Society, 1931) (Sermon entitled "Christian Charity" preached aboard The Arabela, Massachusetts Bay, 1630)). This covenant was prompted by God's calling his subjects to be a "beacon to humanity," an agreement to be "as a City upon a Hill." Winthrop, supra, at 294-95.

Or, as the economist would have it, his or her utility increases.

TREATISE ON FAMILY, supra note 31, at 288-96 ("Rotten Kid Theorem").

Cf. Ben-Porath, supra note 31, at 54 (criticizing this view and stating that there must be outward direction on all sides).

In the early Hebraic world, a God active in human affairs was the guarantor of covenants. Covenant-making erected a future of promises on the experience of God's past providential mercy. Everett, supra note 15, at 562. The covenant related people to the land. Despite the numerous attempts by the Israelites to avoid their promises to Yahweh, God remained faithful to them. This theme of unfaithfulness and constancy recurs throughout the historical books of the Bible and is particularly obvious in the writings of the prophet Hosea, who uses the imagery of husband and wife. See Hosea 11:8-9, 14:4-5 (Revised Standard Version); see also William J. Everett, Shared Parenthood in Divorce: The Parental Covenant and Custody Law, 2 J.L. & RELIG. 85, 85-99 (1984). When the modern promise under seal is enforced, the appropriate remedy is expectation damages. See Melvin Eisenberg, Donative Promises, 47 U. CHI. L. REV. 1 (1979).

MICHAEL TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 12 (1993); Lon Fuller, Consideration and Form, 41 COLUM. L. REV. 799, 799 (1941).
behavior is constrained by the covenant. Everett suggests, for example, that covenant "had elements of both imposition and voluntarism within the partnership with land and with past and future generations. Covenant formed a web of relationships between the God of history, the people, and the land." In a way, once the covenant is made, more than the two people are involved. The imprimatur of the state (or God) is placed upon the solemn promise.

III
 TESTING THE COVENANT MODEL

To test the covenant model in terms of how it comports with practical and aspirational standards, we must reexamine Regan’s hard cases involving same sex couples, cohabitants, and natural fathers of children born during the mother’s marriage to another. Regan’s argument is that the gay or lesbian couple frequently seeks to

Everett suggests, for example, that “parenthood is a participation in the covenant with God, who presides over the generations of our history on the land. Both parents participate in that covenant as parents, not as spouses. Therefore, upon the failure of the marriage this covenant cannot be dissolved summarily and reconstructed by the courts.” Everett, supra note 15, at 566. See also Carbone & Brinig, supra note 39, at 1005-08 (uncoupling childrearing from marriage). As Moore writes, covenant, in contrast to contract, is "literally more than is bargained for," creating “individual-in-community and, as that relationship becomes constitutive of subjective identity, community-in-individual.” Moore, supra note 6, at 168.

For example, in his descriptions of indissoluble marriage, Pope Paul VI did not use the term “contract,” but only “covenant,” showing the strong emphasis upon conjugal love. See Morrisey, Proposed Changes in Canonical Matrimonial Legislation, 20 CATH. L.W. 30, 31 (1974); see also Joseph L. Allen, Love and Conflict: A Covenantal Model of Christian Ethics 17 (1984) (stating that the covenant model does not involve seeing a relationship as one of “bargaining . . . in which the rights and obligations of each person are limited to what has been agreed to . . . in the bargain”). Older religious discussions of covenant appear in 2 Cor. 3:6 (God has made us competent to be ministers of a new covenant); Genesis 9:8-17 (covenant with Noah); Hosea 2:19-25 (opposed to unfaithfulness); 1 Kings 8:16; Psalms 89:1; 2 Solomon 7:9-37 (Davidic covenant). See also Miller, supra note 11, at 23-27 (Esau gives up his birthright).

The covenant between citizens and government is described in Daniel Elazar, American Federalism: A View from the States 3 (1984). Additionally, Moore notes that elements are shared by the Puritan and Judaic notions of covenant:

The first, akin to heshed, is a deep awareness of human dependence on divine grace, the ‘good not our own.’ The second, akin to mitzvot, is the possibility that a freely chosen relationship can become so constitutive of one’s identity as to transform action from banal to meaningful and even sacral.

Moore, supra note 6, at 176. The relationship between the transformed self and the community is discussed at length by Regan in Chapter 3, entitled Postmodern Personal Life, as in many ways a loss of self. Regan, supra note 3, at 68-88.

Regan, supra note 3, at 119-22, 152.

Id. at 123-27.

Id. at 151-57.
make a commitment\textsuperscript{178} and that their relationships would be more stable if society permitted legal ties.\textsuperscript{179}

Covenant would also afford stability in states that do not prohibit the underlying sexual conduct. If the state continues to proscribe sexual expression between non-heterosexual couples,\textsuperscript{180} government itself constrains the relationship.\textsuperscript{181} The same-sex couple cannot enforce any explicit relationship-related contract because of the illegality of the relationship.\textsuperscript{182} However, the couple can make the permanent commitment and exhibit the selfless loving and giving required for a covenant. Some religious groups are now sanctioning such exchanges,\textsuperscript{183} and Regan notes that some localities are passing domestic partner legislation.\textsuperscript{184}

Similarly, the lens of covenant reveals the same problems with cohabiting couples that Regan demonstrates.\textsuperscript{185} Many heterosexual

\begin{thebibliography}{99}
\bibitem{178} Id. at 120. \textit{See, e.g.}, Adoption of Robert Paul P., 471 N.E.2d 424 (N.Y. 1984) (denying petition to gay man to adopt his partner).
\bibitem{179} \textit{Regan, supra} note 3, at 121-22.
\bibitem{181} \textit{Regan, supra} note 3, at 121-22.
\bibitem{182} \textit{See, e.g.}, \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986).
\bibitem{185} \textit{Regan, supra} note 3, at 123. The Hawaii legislature has found that Hawaii's marriage licensing laws "were originally and are presently intended to apply only to male-female couples, not same-sex couples." 1994 Haw. Sess. Laws 217, \$ 1. At the same time, in \$ 6, the bill establishes a commission on sexual orientation and the law to examine whether benefits extended to heterosexual couples should also be extended to their same-sex counterparts, and to recommend appropriate legislation. 1994 Haw. Sess. Laws 217, \$ 6.
\end{thebibliography}
partners that do not marry either deliberately avoid marriage because of its constraints or use cohabitation as a screening function for a later marriage.\textsuperscript{186} Although many cohabitation relationships endure successfully for long periods of time, they are clearly less stable than marriage, if only because the parties expect their relationship to last only so long as they “love” each other. Thus, emotional “highs” are even more important than in marriages, and are often a euphemism for infatuation.\textsuperscript{187} The couple, even more than the modern married couple, never ends the courtship behavior of looking appraisingly at every potential alternative mate.\textsuperscript{188} There is no unequivocal “retirement” from the marriage market. Finally, most (although not all) of these couples refrain from having children, or, as my aunt calls them, little anchors. For the most part, then, cohabitating couples have no permanent commitment to each other or to a lifetime of co-parenting.\textsuperscript{189}

Finally, we can look at the situation of the unwed father.\textsuperscript{190} He is increasingly litigating his plight by arguing for his lost parental rights.\textsuperscript{191} Although there are undoubtedly exceptions to the rule, most unwed fathers are unwilling to make the commitment necessary for fatherhood.\textsuperscript{192} This may be simply because the unwed father lacks connection to the child’s mother. Particularly if we look in terms of

\textit{Settled Bunch,} \textit{WASHINGTON POST}, March 20, 1994, at B1 (citing 1987-88 National Survey of Families and Households and its finding that “most cohabitations don’t last long”).

\textsuperscript{186} See \textit{Rational Decisionmaking, supra} note 158, at 88-89.

\textsuperscript{187} \textit{REGAN, supra} note 3, at 118-28.


\textsuperscript{189} See Schneider, \textit{supra} note 68, at 520-22 (arguing that the current legal position toward cohabitants as urging them toward marriage). Cf. Barbara Dafoe Whitehead, \textit{Dan Quayle Was Right: Harmful Effects of Divorce on Children}, 271 \textit{THE ATLAnrIc} 47 (April 1993) (discussing various studies revealing the negative short and long term effects of divorce on children).

\textsuperscript{190} See, e.g., \textit{REGAN, supra} note 3, at 131-39.


\textsuperscript{192} See Everett, \textit{supra} note 15; McCant, \textit{supra} note 26; Schneider, \textit{supra} note 68, at 526-28. California’s rule can be seen as buttressing a version of marriage and a view of parenthood, and disadvantaging the alternative institution. Schneider, \textit{supra} note 68, at 528. Woodhouse, \textit{supra} note 29, at 1772-75, discusses Joseph of Nazareth as the “most richly symbolic of gestational fathers.” \textit{Id.} at 1773.
what is best for the child in such situations, the two parent alternative is usually more attractive.

**Conclusion**

*Family Law and the Pursuit of Intimacy* is a book that makes us think not just about families but about who we are as people. It disturbs us, stretches us, and challenges us. Whether we settle on Regan's paradigm of status or the covenant alternative, we need to rethink the effects and the message of modern family law. We need to encourage responsibility in ways that do not promote or suggest gender or racial inequality. We need to make appropriate concessions to pluralism without losing all moral sense. In short, as a society we need to return to the intimacy Regan promotes in this worthwhile book.

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194 See Woodhouse, *supra* note 29, at 1814 (parenthood is stewardship, not ownership). See also Katharine Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 294-95 (1988) (advocating a focus on each parent-child relationship, focusing "on parental responsibility rather than reciprocal rights").