

CRACKING THE FOUNDATIONAL MYTHS: INDEPENDENCE, AUTONOMY, AND SELF-SUFFICIENCY

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I. INTRODUCTION¹

Feminist legal theorists can legitimately complain that most mainstream work fails to take into account institutions of intimacy, such as the family. Discussions that focus on the market, for example, typically treat the family as separate, governed by an independent set of expectations and rules. The family may be viewed as a unit of consumption, even as a unit of production, but it is analytically detachable from the essential structure and functioning of the

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1. This Article is based on a book in progress in which I argue that there is a compelling need for us to reconsider the basic distribution of responsibility for dependency among societal institutions, specifically the family, the state and the market. This Article sets forth my ideas about dependency and suggests a mechanism for increasing public discussion about the vision of society we are collectively creating in and outside of our political institutions.

market.

Similarly, when theoretical focus is turned to the nature and actions of the state, the family (if it is considered at all) is cast as a separate autonomous institution. Of course, the state may explicitly address the family as a site of regulation or policy, but in non-family contexts, the extent of societal reliance on the family is un- or under-theorized. There is little recognition that policy discussions about economic and social issues implicitly incorporate a certain image of the family, assuming its structure and functioning.

Likewise, theorists who focus on the individual seem to deny the family any potential relevance or theoretical significance in their work. Jurisprudential constructions of justice or liberty, for example, consider the individual as the relevant unit of analysis.² The implications of the fact that individuals exist in family or relational contexts are largely ignored. It is no surprise, therefore, that little attention has been paid to how assumptions about the family affect the theories expounded in regard to market and state or the nature of the individual. Few theorists recognize just how reliant their particular visions of the world—as “just,” “efficient,” “natural,” or “empirically based”—are on the consensus that the family is the institution primarily responsible for dependency.

This reliance on what I have termed the “assumed family” distorts analysis and policy. The assumed family is a specific ideological construct with a particular population and a gendered form that allows us to privatize individual dependency and pretend that it is not a public problem. Furthermore, the gendered nature of this assumed family is essential to the maintenance and continuance of our foundational myths of individual independence, autonomy, and self-sufficiency.³ This assumed family also masks the dependency of society and all its public institutions on the uncompensated and unrecognized dependency work assigned to caretakers within the private family.

In economic and other important public policy discussions, we focus on the appropriate relationship between market and state, with the family relegated to the “private” sphere. Discussions proceed as though the policies that are designed to affect these institutions in the public sphere have only few implications for the unexamined

2. See Randall P. Bezanson, *Self-Reliance*, 71 N.D. L. REV. 29, 30 (1995) (asserting that the choice of exercising liberty rests only with the individual).

3. Expressed as ideals, these abstract characteristics are theoretically attainable by individuals only because we assume that families exist and perform their functions—producing, nurturing, and providing for their members.

private family. Even more fundamental, the discussions fail to grasp the fact that the actual (as contrasted with the assumed) family might profoundly affect the possibilities of success and failure of policies created for the market and the state.

II. PUBLIC AND PRIVATE CONCEPTS

To point out the neglect of the family in legal and policy theory differs from concluding that the family has been considered an unimportant institution. In fact, the importance of the family is asserted in its very segregation from other areas of human endeavor. This separation is exemplified in the often repeated characterization of family law as one of three *separate* pillars of civil society—the other two being property and contract.⁴ The division of the world (and law) into “public” and “private” realms also manifests the dual conceptualization of the family as both separate and as essential.⁵

Not only is the family perceived as occupying the private sphere, it is also conceptualized as embodying values and norms that are very different from the institutions occupying the public sphere, particularly those of the market. Family relationships are cast as different in function and form than relationships existing in the public world. Families are altruistic institutions held together by bonds of affection. Of course, any serious consideration of the family reveals that it is a very public institution, assigned an essential public role within society.⁶ The family is delegated primary responsibility for dependency.

In this Article, I will bring into view the family, or more explicitly, the dependency hidden within the assumed family. Policy development and social theory considerations should center on assessing the appropriateness of the aspirations and expectations we have for the family. This assessment is crucial to one of the most

4. See Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 479-81 (1988) (discussing the reconceptualization of contract, property, and family law).

5. The characterization of the market in this public/private scheme is interesting. It is cast as public *vis-à-vis* the family, but private *vis-à-vis* the state, seeming to gain the advantage of each category. In this regard, it is interesting to note that when the comparison is of market versus family, the “private” sphere of the family is subject to heavy public regulation, mostly because it retains aspects of “status” and is not governed by contract. In contrast, the “public” arena of the marketplace is governed by bodies of designated “private” law, such as contract. These contrary characterizations have ideological nuances.

6. See Nancy F. Cott, *Giving Character to Our Whole Civil Polity: Marriage and the Public Order in Late Nineteenth Century*, in U.S. HISTORY AS WOMEN'S HISTORY 107 (L. K. Kerber, A. Kessler-Harris & K.K. Sklar eds., 1995) (giving a historian's perspective on the family as an institution). Professor Cott states that “one might go so far as to say the institution of marriage and the modern state have been mutually constitutive . . . one of the principal means that the state can use to prove its existence . . . is its authority over marriage.” *Id.* at 109.