

Separation Anxiety

NORMA BASCH

FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS
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Milton C. Regan, Jr.

THE UNITED STATES is notable for the extent to which participants in political debate often rely on family imagery to make their points. "It's A Child Not A Choice" and "Hate Is Not A Family Value" are but two examples of how "family values" has become a highly-charged term that stands for broad ideological commitments. In particular, marriage is often used as a trope of harmony and unity, and divorce as a trope of instability and disorder. Each perhaps has special salience in a country whose "marriage" of citizens in a common unit occurred through acts of consent rather than deference to ostensibly natural organic ties. The United States was formed literally, rather than simply metaphorically, through ratification of a social contract. Yet that contract became possible only through an act of "divorce" that revealed the provisional nature of any allegiance conceptualized in contractarian terms. The colonies severed a tie regarded in some quarters as inviolable on the

ground that the union of which they were members was insensitive to their interests and welfare.

As Norma Basch suggests in *Framing American Divorce: From the Revolutionary Generation to the Victorians*, this background may have prompted Americans to be especially prone to draw on "private" experience as a symbolic gauge of the health and stability of "public" life. In particular, she argues, an historical perspective on the legal and cultural rhetoric surrounding divorce rules illustrates that as we celebrate individualism and its contractarian approach to social ties, ambivalence about it is never far below the surface. Furthermore, that ambivalence is colored in complicated ways by considerations of gender that are not always explicitly acknowledged or even recognized. Basch seeks to capture the richness of the divorce debate by examining political discussion, court records, and treatments of divorce in popular culture from 1770-1870, a period

Mitt Regan is a Professor of Law at the Georgetown University Law Center.

during which she maintains that “Americans shaped the foundations for divorce as a legal institution.” (p. 4) No unqualified conclusions easily emerge from her multi-layered analysis. Nonetheless, the book sheds light on some of the persistent themes that tend to recur in discussions of divorce in American society. At an even more fundamental level, it suggests that treating marriage and family as icons of “safety, order, and harmony” (p. 2) in the “private” realm may be less fruitful than more complex imagery that frankly acknowledges tensions common to what we think of as both “private” and “public” life.

FRAMING THE RULES

The first part of the book, called “Rules,” describes the ways that the debate over whether, and on what terms, divorce should be allowed evoked broader anxieties about the implications of a contractarian conception of the social order. The American Revolution posed a particularly sharp challenge to the traditional understanding of society as a natural hierarchy of interlocking parts, in which authority flowed automatically from the higher to the lower orders. Such a conception regarded political bonds as indissoluble and ultimately exempt from the need for rational justification. To varying degrees, defenders of the monarchy invoked familial imagery to underscore the natural character of authority in such a system. Robert Filmer, for instance, maintained that the crown’s exercise of power was akin to that of the father’s natural power over children.¹ John Locke famously refuted this assertion by contending that parental power is legitimate only insofar as it is aimed at cultivating children’s capacity for eventual autonomy.² Similarly, Basch suggests that this

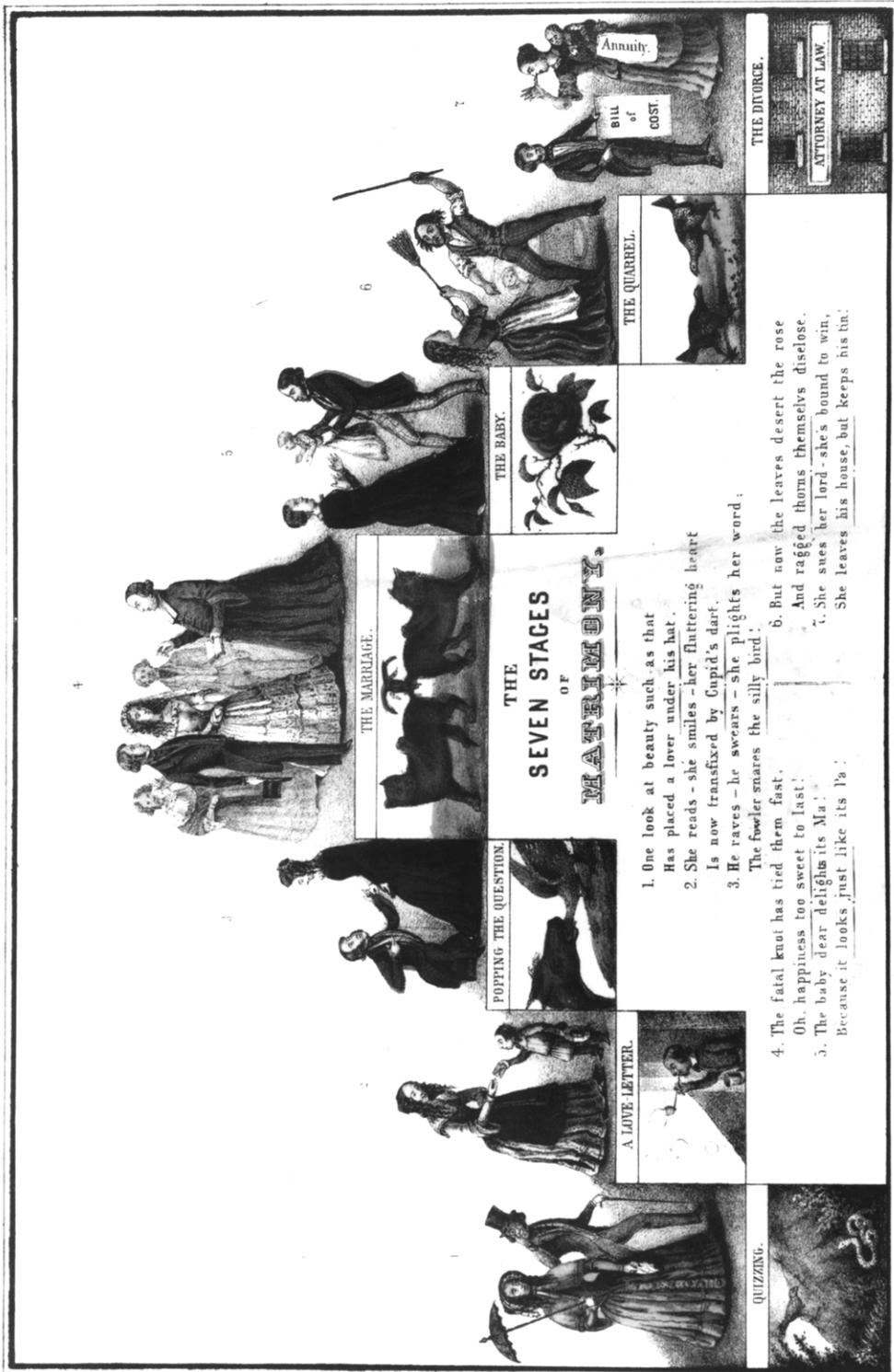
perspective illuminates the fact that portions of the Declaration of Independence resemble a divorce petition, setting forth the various ways in which one partner has failed to fulfill his duties, which provide a justification for severance of the marital bond. Such discourse suggested that state and family were connected in fundamental, if often imprecise and indirect, ways in the Anglo-American cultural imagination.

While the equation of marriage and the polity may have had a traditional cast, grounding the legitimacy of both forms of association in consent was a sharp departure from conventional ideology. Such a step was both liberating and terrifying. Basch argues that the anarchic potential of a contractarian view of society generated considerable ambivalence about the ease with which divorce should be possible. She notes, “It is precisely because marriage in its consensual-but-indissoluble form stood as a far-reaching metaphor for the existing political order that it served as a convenient hedge against incipient political upheaval.” (p. 27) This meant greater acceptance of divorce in the United States than in England, coupled nonetheless with resistance to the idea that contractarian logic should be carried to its full conclusion by making divorce available simply at the request of the parties. The result was a regime in which fault served as the justification for severing marital bonds.

Basch finds it striking that the debate over divorce from the Revolutionary period until the mid-nineteenth century contained little express mention of the implications of reform for relations between men and women. She argues that this absence reflects an attempt to elide the potentially radical challenge to men’s authority over the household that a contractarian account of marriage could present.

¹ Robert Filmer, *Patriarcha*, in *PATRIARCHA AND OTHER POLITICAL WORKS OF SIR ROBERT FILMER* 53, 54-55 (Peter Laslett ed. 1984)(1649).

² John Locke, *TWO TREATISES OF GOVERNMENT* 147-48 (Peter Laslett ed. 1988)(3d ed. 1698).



Lithograph "The Seven Stages of Matrimony" by Nathaniel Currier. New York, c. 1845. Courtesy American Antiquarian Society.

Fault-based divorce limited the grounds of dissolution, and socioeconomic realities constrained the ability of women to use divorce for individual emancipation even when those grounds could be established. Nonetheless, to the degree that consent served as the source of legitimation for the marital bond, marriage was no longer a "sacred contract." (p. 27) This conceptual transformation afforded the opportunity to contest the structure of power within marriage. Interestingly, both supporters and opponents of divorce liberalization generally refrained from acknowledging this possibility, preferring to frame their arguments in more universal terms. Supporters of more lenient divorce laws emphasized a narrative of innocence and fault, in which genderless victims suffered individual wrongs. Opponents characterized divorce as a threat to law and order, and occasional marital hardship as the necessary price of maintaining social and moral stability.

Complicating matters was the fact that feminists themselves were divided over the extent to which divorce should be freely available. They agreed that the subjection of wives to husbands was the prototype of the inequality of women in public life, but differed on how best to address that dynamic. One group denounced marriage and regarded lenient divorce laws as the means by which women could achieve the status of independent agents. For these women, marriage law was an inherently coercive regime established to preserve male dominance. Another camp sought not to dismiss marriage, but to reform it by providing greater protections for women. These feminists saw marriage as the source of both financial support and social status for women, and as a restraint on male sexuality and efforts by husbands to cast off wives as they aged. As Basch notes, "The spacious sense of female autonomy that nourished support for divorce was offset by the daunting vulnerability women felt at the prospect of

eroding its safeguards." (p. 79) Furthermore, reformers regarded a focus on women's marital responsibility for moral instruction as offering a basis for challenging some aspects of husbands' behavior during marriage. Women's moral agency, which was used to argue both for liberalization of divorce to increase women's freedom and for limitations on divorce to cabin immoral behavior, thus became an increasingly important part of the divorce debate.

FRAMING THE LAWSUITS

In Part II, "Mediations," Basch moves from the level of formal law and public rhetoric to a fine-grained view of divorce records in an effort to explore the differing implications for men and for women of strict and lenient divorce codes. To analyze the disparity, she relies on divorce records from 1787-1820 in New York, where divorce was available only for adultery, and similar records from 1818-1870 in Indiana, the "divorce mill" of the early nineteenth century, in which divorce was permitted upon a finding of marital "misconduct."

Basch argues that divorce petitions offer insights into how theoretical debates about a more contractarian view of marriage, which for the most part conspicuously ignored issues of gender, were played out in distinctive concrete ways for husbands and wives. Her chapter on women who instituted divorce proceedings notes that women brought many more such proceedings than did men in the nineteenth century, often in response to a de facto divorce initiated by husbands through desertion. The primary, often sole, remedy that these and other divorcing wives received was the return of any property they had owned prior to marriage, along with the eligibility to remarry. Alimony enjoyed little favor even when the husband was present, was sometimes avoided by the husband's transfer of assets prior to divorce, and depended upon

a judgment that the woman had been faultless in her behavior during the marriage. Even when alimony was not at stake, divorce actions always contained the risk that the woman might be subject to attacks on her character or implicitly condemned for her husband's misconduct because she had been unable to fulfill her wifely role of providing moral guidance for her partner. Basch concludes that for these reasons many women may have forgone divorce. She acknowledges that liberalization of divorce law did have the potential for enabling women to see themselves as independent agents rather than simply objects of their husband's protection. But because it so often merely ratified a status quo in which men unhappy with their wives resorted to "self-help" by leaving them, it implicitly legitimated a form of extralegal divorce that for social and economic reasons was available primarily to men.

Basch suggests that the specter of wives' potential independence was also an undercurrent in husbands' petitions for divorce. She maintains that in many cases, men sought to reconcile traditional male household authority with an emerging emphasis on marital affection and companionship by characterizing wifely loyalty and obedience as expressions of romantic commitment. As Basch observes, "From the perspective of male plaintiffs, one way a woman expressed her love was through her abiding loyalty to her husband in public as well as in private life." (p. 125) Husbands also asserted their authority by demanding custody of children when wives were accused of adultery, on the ground that female chastity was the foundation of both the family and the larger society.

While the greater availability of divorce enabled both women and men to exercise greater freedom than before to seek legal termination of their marriages, divorce petitions nonetheless reflected growing tension between traditional concepts of marriage and

individualistic implications of a companionate ideal of marriage. The legal bestowal of limited gender-neutral independence had complex practical consequences in a marital setting shaped by gender roles.

FRAMING THE STORIES

In Part III, "Representations," Basch examines divorce from yet another perspective, that of popular literary culture of the nineteenth century. She examines the treatment of divorce in both newspaper pamphlets devoted to sensational divorce cases and in romantic novels. Each genre reflected stylized accounts of divorce that tended to convey quite different messages about its significance and implications. Each also was more explicit about gender issues than was much of the public debate over divorce during this period.

Pamphlets generally reported on celebrity divorces in which there were allegations of adultery, with jury trials involving claims of wives' sexual infidelity evoking the most interest. As Basch notes, "[a]ll the women who stood at center stage in these fiercely contested suits had sorely tested the limits of their husbands' authority, thereby raising the specter of female autonomy." (p. 152) Such women posed a potential threat to the ideal of female chastity, but also raised questions about the extent to which husbands should substitute affection and benevolence for traditional forms of authority. Those wives who were successful with juries managed at least implicitly to convince them that a woman's marital duty to comply with her husband's wishes was contingent upon his responsiveness to her emotional needs. The highly visible divorce trial, while hardly representative of average men and women, thus was one arena in which society sought to define changing understandings of responsibilities within marriage.

What is striking about the popular press accounts of these trials is their persistent

sympathy for wives as victims of their husbands' mistreatment, even in the face of strong evidence otherwise. Women tended to be portrayed as helpless and passive in sentimental narratives that often provoked widespread public support for them as "wronged" defendants, despite cases in which wives had acted boldly and sometimes flagrantly. This solicitude for the wife ostensibly victimized by her husband's cruelty reflected an advance for women in the sense that it insisted on a more egalitarian ethos of companionship as the basis for the marital bond. At the same time, Basch notes, the emphasis on wives as victims minimized the perception of them as agents who could act independently and be held accountable for it. Divorce pamphlets promoted the idea that women were still under the protection of male judges and juries who stepped in to rescue them from exploitation by other males. This notion preserved the legitimacy of ultimate male authority over women, while acknowledging that its exercise within marriage had to be qualified by increasing expectations that men would provide emotional, not just financial, support for their wives.

Sentimental novels of the nineteenth century reflected a different perspective, one fearing that media such as divorce pamphlets risked emptying divorce of shame. The clear message in these novels was that women needed marriage because of its social and economic advantages, and that they earned these advantages by providing moral instruction for men whose appetites otherwise would be unrestrained. On this view, marriage was primarily a matter of duty, not romance. A wife "demonstrated her moral superiority by the fortitude with which she endured her harrowing encounter with male authority." (p. 181) Those wives who neglected this truth paid

dearly for their selfishness, as they slipped into poverty, illness, and unhappy deaths.

Basch suggests that the divorce stories in these two genres reflect efforts to deal with the tension between "a society devoted to romantic love on the one hand and lifelong monogamy on the other." (p. 185) The specter that haunted each form of narrative was a romantic self unfettered by any constraints of either individual conscience or social responsibility. Each genre dealt with that specter in its own way, depicting women as either "powerless victims or self transgressors." (p. 185) Each sought to reaffirm male authority, but struggled to do so in an era in which various forces operated to diminish and threaten that authority.

HUSBANDS, WIVES & SAFE HARBORS

One way to see the story that Basch has told is as an ongoing struggle to use marriage as a constraint on the contractarian account of social life. The American Revolution prompted an understanding of legitimate social ties as the product of consent. The absolute indissolubility of marriage was starkly inconsistent with this principle, which made at least some relaxation of divorce law seem appropriate. Yet, as several feminist scholars remind us, the family was conspicuously absent from the story told by social contract theorists.³ Marriage and family life was a realm that was seen as resting ultimately upon the dictates of biological necessity rather than reasoned choice – dictates to which women were deemed particularly subject. For this reason, the principle of consent could not be imported wholesale into marriage. Furthermore, the notion that society was based on consent "all the way down" seemed to neglect

³ See generally Nancy Hirschman, *RETHINKING OBLIGATION: A FEMINIST METHOD FOR POLITICAL THEORY* 35-76 (1992); Carole Pateman, *THE SEXUAL CONTRACT* (1988).

the crucial non-contractarian foundations of the social contract. How could that contractual arrangement ever get off the ground without background norms such as trust and commitment to limit the quest for immediate self-interest? Family life was thus carved out of the social contract to preserve its place as the locus of natural altruistic sentiment. Because it was rooted in nature, it could serve as a perpetual constraint on individualism that was more stable than other social arrangements based on choice and consent.

As Basch suggests, the compromise that emerged was that individual choice properly came into play as a basis for dissolution of marriage only when one spouse was at fault. Just as a proclamation of political independence was justified only when there were grievances that undermined the purpose of the union, so marital independence could be gained only when a guilty spouse had committed a transgression that undermined the ends of marriage. In each case, the destabilizing potential of individualism could be cabined by authorizing dissolution only in cases of serious transgression. Both political and marital divorce thus ideally occurred only rarely.

The idea of marriage as a safe harbor from unalloyed individualism was not based solely on symbolism. When we explore how marriage in a practical sense was seen as curbing egoism, we confront the unavoidable question of gender. As Basch observes, gender generally was not an explicit topic of discussion in the Revolutionary and post-Revolutionary era debates over divorce. The traditional patriarchal household obviously coexisted uneasily with the idea of divorce, but more self-conscious appreciation of gender issues did not emerge until later in the nineteenth century with the emergence of the separate spheres doctrine. That doctrine, of course, proclaimed that men were best suited for the "public" world of the market and politics, while women were naturally best fit for the

"private" world of domestic matters. Within the scope of the wife's responsibilities was the duty to provide moral instruction to her husband, so as to temper the individualistic impulses loosed by his involvement in the world outside the home.

This conception of gender roles highlighted the belief that marriage was an institution designed to enable women to curb the appetites of men. Opponents of more lenient divorce laws argued that easier divorce would undermine this function of marriage, with devastating consequences for society as a whole. Men could use liberal divorce laws to free themselves from moral constraint. The result would be to allow them even greater freedom to act unchecked by any allegiances beyond those based on self-interest. Men would become more predatory not only in public life, but would "use up" and discard women more easily in private life as well. At the same time, wives married to difficult men could more easily eschew efforts to reform their husbands, and instead opt simply to leave. This meant that women would be less likely to play their role of providing a model of selflessness, which was necessary to counter the individualistic tenor of a model of social relationships based on choice and consent. The greater autonomy promised by more liberal divorce laws thus posed different kinds of dangers when exercised by both husbands and wives. It is not hard to see, however, that the independence ostensibly granted women by such laws was potentially more threatening. For wives to act on that independence would have the compound effect of reducing the power of marriage to brake the inherent self-interest of men while spreading self-interested behavior to the very ones whose role it was to provide a brake against its anti-social influence: wives. Acknowledging that women might wish to seize that opportunity would undermine the notion that there was a natural sphere of selflessness that would always pre-

vent individualism from gaining unchallenged influence over social relationships.

As Basch persuasively suggests, one way to minimize this specter was to characterize women's exercises of independence as reactions to their husbands' misconduct rather than as instances of women taking the initiative as agents accountable for their own happiness. The sympathetic treatment of defendant wives in the divorce pamphlets she describes was one instance of this approach. Another was the expansion of the ground of marital "cruelty" to encompass husbands' failure to provide the emotional support supposedly demanded by the companionate ethic. Each instance reinforced gender stereotypes. There were some men who ultimately were beyond influence from even the most selfless woman, and a wife needed protection in such cases from the unmitigated egoism of her husband. Reliance on stereotypes of rapacious men and vulnerable women thus reflected an effort to defuse the destabilizing potential of extending to women the right to leave their marriages under certain circumstances.

The meaning of women's autonomy could not be so easily confined, however. It was but a relatively short step from defining cruelty to include emotional neglect to concluding that simple unhappiness was a justification for seeking a divorce. The rhetoric surrounding marriage and divorce now is more explicitly individualistic and contractarian, emphasizing the importance of choice for both men and women in making decisions about whether to continue or to end this intimate relationship. This has prompted anxiety that there may be no "natural" sanctuary remaining to protect us from the relentless pressures of individualism – that the mores of the market are eroding the organic soil in which social ties are cultivated. It

is thus not surprising that the "culture wars" that seem to characterize American society focus so intently on "family values." Abortion, AIDS policy, teenage pregnancy, divorce, and reproductive technology are but a few of the issues that take on highly charged significance in modern political debate. Nor is it surprising that, despite more egalitarian norms, women remain central characters in these morality plays. For conservatives, phenomena such as women's greater workplace participation, their access to abortion, their sexual choices, and their decisions to divorce all reflect a focus on personal satisfaction that rejects the traditional female virtues of selflessness and altruism. The fear is that if women are no longer available to curb individualism, no one is. The result is a society wholly defined in contractual terms, bereft of any natural foundation of benevolence not based on calculation of individual gain.

Anxiety about this prospect accounts for at least some of the shift in emphasis from marriage to parenthood as the conceptual foundation of contemporary family law. As June Carbone suggests, "Across the academy, the courts, classrooms, and election campaigns, the code of family responsibility is being rewritten in terms of the only ties left – the ones to children."⁴ Marital status is now less important than parenthood as the basis for many distinctive rights and obligations. The effect of divorce on children has become a subject of considerable attention, and there is a consensus across ideological lines that we must be more diligent in pursuing "deadbeat dads" who fail to pay child support. Furthermore, some commentators argue that legal concern about marriage itself is predicated on a more fundamental concern for the welfare of children.⁵ If marriage now is subject to the instability and contingency of individual

⁴ June Carbone, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* xiii (2000).

⁵ Harry Krause, *Marriage for the New Millennium: Heterosexual, Same-Sex – Or Not at All?*, 34 *FAM. L.Q.* 271, 298-300 (2000).

choice, perhaps the parent-child relationship can provide a rock of altruistic stability that will preserve the viability of non-contractarian values. Parenthood's prominent biological roots make it a plausible candidate to provide reassurance that there will always be a "natural" realm of family life that serves to limit the reach of individualism – that persons will still have the experience of forming and sustaining bonds that are not based solely on consent and perceived benefits from the relationship. On this view, marriage will matter primarily because many couples are likely to be parents, not simply because they are spouses.

This conceptual shift has the potential to do much good. Greater focus on the needs of children both during marriage and after divorce is surely welcome in a country that too often pays lip service to the importance of children's welfare. We also need to appreciate, however, that while this model is formally gender-neutral it is unlikely to be so in practice. Women overwhelmingly are the major caregivers for children, and it is the mother-child bond that is most likely to be regarded as the paradigm case of the parent-child relationship.⁶ This reflects the persistence of the view that women are more rooted in a "natural" sphere in which choice and consent are less significant than they are for men. This assumption could have pernicious consequences for women. Consider divorce, for instance. Evidence indicates that the benefits that men receive from marriage generally do not depend on the quality of the marriage, while the benefits that women receive typically do.⁷ It is therefore not surprising that women tend to initiate divorce actions more often than do men, even though they risk more financial disadvantage by doing so. Emphasis

on a less individualistic orientation when contemplating divorce thus could be interpreted as the implicit expectation that women are more obligated than men to put their children's interests ahead of their own desire for divorce. This prospect has generated both considerable controversy about the accuracy of studies on children of divorce as well as disagreement about their implications. Similarly, treating the parent-child bond as the model of benevolence may lead to the assumption that women are the parents who should make the sacrifice in earning power that is necessary to nurture children.

The point is that parenthood, no less than marriage, is not a natural haven of unalloyed sentiment without controversy or contest. It does involve powerful attachments that are rooted at least initially in dependence rather than in any meaningful notion of choice. This can provide an important corrective to the view that obligations must be grounded in consent in order to be legitimate. But, as many parents and children can attest, the relationship also involves the potential for tension between individualist and selfless orientations. Assuming either orientation without due consideration to the other fails to do justice to this tension, and thus to the complexity of this tie. Further, it carries an echo of the earlier dynamic that Basch has described, in which women's initiatives on their own behalf are downplayed in favor of the stereotype of females as repositories of society's supply of altruism.

An important lesson to draw from Basch's book therefore is that it may be time to abandon the use of marriage and family as a trope for natural social relationships untainted by individualism. This abandonment emphati-

6 Indeed, Martha Fineman is explicit about this bias, at least as a readily understandable way to express the importance of reordering social priorities to protect caregivers in general. See generally Martha Fineman, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH-CENTURY TRAGEDIES* (1995).

7 See Steven Nock, *MARRIAGE IN MEN'S LIVES* (1998).

cally would *not* represent acquiescence in the absolute triumph of contractarian values in social life. Rather, it would reflect rejection of the idea that there is any natural sphere of life free of human agency that will guard us from the excesses of our own egoism. That myth ultimately is an effort to escape responsibility for our actions. Its faith in the unvarnished altruism of the “private” sphere prevents us from confronting in any systematic way the need for constraints on individualism outside the family in society at large. At the same time, it hinders our appreciation that the family requires justice as well as care, and our acknowledgment of women as complex moral agents. Recognizing it as a myth calls into question the premise that social life is sharply divided into distinct domains organized according to fundamentally different principles. We struggle to reconcile individual and communal perspectives in a multitude of situations, not just in the worlds of marriage, divorce, and parenting. We can’t avoid that task by assuming that there is a realm of life unshaped by human choice that obviates the need to take both perspectives into account.

To be sure, the family is a setting in which notions such as trust, vulnerability, and altruism are especially salient. Their resonance provides a rich experiential foundation for resisting the reduction of all social relationships to contractarian logic. Family serves as a model for understanding how broader social obligations also might arise from interdependence rather than consent. This is important in a world in which the “public” domain can seem remote and inaccessible to meaningful comprehension. The conquest of the family by the tenets of individualism would deprive us of an important cultural source of moral imagination. Appreciation of this, however, is different from maintaining that the family is a

sphere in which choice and individualism have no place. That is an incomplete portrait of family life and, as Basch illustrates, it can be used to reinforce gender inequality and deny the legitimacy of women’s exercise of autonomy.

The family is likely to continue to be a lightning rod in political debate because it calls upon us to confront and resolve basic tensions of social life on a scale that is accessible, in a setting where we all have experience. George Lakoff, for instance, has suggested that liberal and conservative moral and political positions rest ultimately on distinctive models of the family, which we extend metaphorically to other domains of life. The image of “Nation as Family” has powerful influence in such discourse.⁸ Marriage is a relationship that begins in consent and now can end by choice. Yet it also involves obligations arising from interdependence that are not purely the product of volition. Marriage – like family – involves a tension between individualistic and communal orientations in “private” life to which many people can relate. As such, it has the potential to spark the use of moral imagination to envision how that same tension arises in “public” life.

Indeed, *Framing American Divorce* documents that, from the outset of our republic, marriage has never been regarded as a purely private relationship devoid of public significance. It has always been invested with cultural meaning as an arena in which Americans have tried to work through the complexities of individualism. As Basch makes clear, this effort necessarily involves appreciation of how abstract ideals of autonomy and care have been coded by gender. The effort to constrain contractarian logic by positing a natural domain insulated from influence by the ethic

⁸ George Lakoff, *MORAL POLITICS: WHAT CONSERVATIVES UNDERSTAND THAT LIBERALS DON’T* (1997).

of consent has always been a fragile enterprise. Even so, widespread acceptance of the idea that marriage is "an association of two individuals each with a separate intellectual and emotional make-up"⁹ has dealt it a particularly severe blow. This need not, however, mean resignation to the idea that social life is

irreducibly contractarian. As we surrender our belief in an Archimedean refuge from the burdens of choice, we have the chance to shape our lives so that women and men each have a genuine opportunity to struggle with the task of accommodating both autonomy and intimacy. *GB*

⁹ Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).