The Limited Vision of Neoliberal Family Law

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Anne Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State,* 77 **Law & Contemp. Probs.** 25 (2015), available at SSRN.

The problem of economic inequality has become a staple of news, social media, and public commentary particularly since the aftermath of 2008 financial crisis. The growing gap between the one percent and the rest provided an issue around which public protests such as the Occupy movement could be organized. And while addressing the many effects of inequality is complicated in its particulars, the need for redistribution as a central legal and policy value has been evident to critical scholars. Redistribution in the form of better social safety nets, a more progressive taxation scheme, and the closing of loopholes all have become more commonplace policy prescriptions, although legislation on these issues has been slow to materialize. Family law scholars and activists have also suggested that reforming policies to ensure more support to families, such as paid family leave and assistance with child care, would also have beneficial effects for working parents and the country's economic bottom line.[1] Even as the United States lags behind all other industrial nations and many developing ones in providing these supports, legislating changes aimed at providing resources that "make family life possible" has been remarkably difficult. The question that lingers is why?

Anne Alstott's essay, *Neoliberalism in in U.S. Family Law*, offers an answer. Alstott argues that neoliberalism, which she defines broadly as a commitment to free markets and laissez-faire economics coupled with a commitment to negative liberty and a minimal state, makes it nearly impossible to claim any positive rights and distribution of resources from the government. She explores the pervasiveness of neoliberalism in three areas of family law –federal constitutional law, state family law, and federal and state welfare law — deftly drawing connections among these discrete doctrinal fields to advance her central argument:

> The entrenched neoliberalism of family law is frustrating for many reasons, not least because it blocks sustained consideration of a more appealing liberalism. Negative liberty, as important as it is, is insufficient for justice. We can imagine—indeed, other countries have adopted—constitutional interpretations that convey positive rights. We can also imagine—and again, other countries have enacted—law that looks beyond the minimalist task of settling private disputes and instead aims to correct market distributions and promote a family life open to all. (P. 26).

In other words, the law continues to maintain the view that families are best served with minimal regulation from the government and that private ordering or free market resource allocation is preferable to government-imposed redistribution. These two pillars of neoliberalism are reflected in the legal decisions and enactments that frame the family in the United States.

Part II of Alstott's essay explores the minimal state and negative liberty in federal constitutional family law. She juxtaposes the numerous decisions that sound in negative liberty, which prevent the government from intruding upon familial privacy (*Loving*, *Griswold*, *Roe v. Wade*, and *Lawrence*), infringing parental rights (*Meyers* and *Pierce*), and allow it to deny any duty to protect vunerable

individuals within families (*DeShaney*) with decisions denying rights to resources. She argues that while negative rights like privacy receive strict scrutiny, positive rights and distributive policies like welfare and taxation receive only rational basis review, nearly immunizing them from constitutional challenge. For instance, examining the welfare cases, Alstott demonstrates that there is no positive right to state support. The state can cap welfare benefits without regard to family size (*Dandridge v. Williams*), refuse to provide public housing or adequate schooling, and limit the amount of time a recipient can receive public assistance. Moreover, the state can deny benefits to children because of the actions of their parents. Even a landmark victory for welfare recipients such as *Goldberg v. Kelly* only guarantees a *procedural* right to be heard before the termination of welfare benefits—it does not assure a right to substantive benefits. Viewing the jurisprudence of negative liberty and welfare rights in tandem, Alstott argues that there is an "asymmetric pattern of federal constitutional protections for family life." (P. 29). In other words, these two lines of decisions harmonize in such a way that even though one has a right to family, one has no right to the resources required to sustain that family. Indeed, there is no right to the resources needed "to marry, to divorce, or even to remain alive…." (P. 29).

Unfortunately, the family fares no better at the subconstitutional level. In Part III of the essay, Alstott demonstrates how state family law privileges private ordering by reinforcing market outcomes and forcing families to bear the costs of reproducing society and the next generation of Americans. Further, between spouses, the state has come to demand private negotiation and ordering as marriage has evolved from a status to contract. With the advent of no-fault divorce and legislation encouraging divorcing couples to reach agreement on matters of property, support and child custody, the state continues to place the onus on achieving justice at dissolution on private, supposedly bargained-for, settlements. While there are limits to what can be negotiated—for instance, a parent cannot bargain away a child's right to support—on most other issues that arise in divorce settlements, the courts rubber-stamp agreements without much inquiry into the ultimate fairness or justice of the outcomes.

Alstott raises a number of critical questions that are prompted by the state's preference for private ordering. As an initial matter, she challenges the pervasive assumption that most families have resources that can be allocated through negotiation. As she explains, most families have few material resources and struggle to support themselves, particularly in economically perilous times. At dissolution, with the loss of economies of scale, these difficulties are compounded. If spouses strike poor bargains for support, or are unable to secure any support because of poverty, they are left to shift for themselves and to subsist on inadequate government support. Even in these dire circumstances, neoliberal assumptions regarding individual choice and agency result in the forced internalization of consequences. The state requires parents who cannot afford to support their children to bear most of the costs of their poor choices or bad luck. Women who trade away support in order to gain child custody are left to support their children the best they can with minimal state intervention or assistance. Poverty becomes an individual moral failing that must be borne by the responsible party.

This depressing outlook makes clear that the family, rather than the state, has become the main institution responsible for the welfare of citizens. As Alstott points out, "welfare programs in the United States provide only minimal and grudging resources for family life." (P. 38). No resources are constitutionally mandated and those that are provided come with erosions of privacy and increasingly onerous requirements like mandatory drug testing, employment, and lack of a criminal record. Poverty alleviation programs have been eroded over time and continue to reinforce the neoliberal vision of individual merit and industriousness as the best way out of difficult circumstances. Moreover, unemployment benefits and Social Security rewards those who have had on-the-books employment, thereby precluding from their ambit some of the most vulnerable people in our society. The recently enacted Affordable Care Act (ACA) continues this trend by balancing neoliberal ideas with expanding access for the poor. The ACA provides health care benefits to middle class workers "by relying on private-market insurance providers." Those who are unemployed or otherwise ineligible for coverage

through their employers are provided with government subsidies that allow them to purchase insurance coverage privately. In this way, although the program expands health care coverage, the provision of health care is secured through privatization, rather than the expansion of the public safety net. Likewise, public education, perhaps the cornerstone of what might be called a "welfare state," has been critiqued for being unequal, increasingly racially divided, and inadequate.

Alstott argues that negative liberty, the free market, and the minimal state have not insured the wellbeing of families. In the absence of positive constitutional rights to state support, families are left to divide market earnings and courts are left to adjudicate claims among individuals in the family. The law will not "aim to correct market distributions and promote a family life open to all". (P. 26). Without the space for a more expansive vision of the state's role in the family and adequate provision of support for those who are economically underprivileged, the forced internalization of the costs of reproducing the next generation, the care of elders, and shifting of welfare functions to the family will result in continued increases in inequality and social stratification.[2] Alstott's critique is a welcome addition to a body of literature generated by material feminists and progressives outlining the inadequacies of negative liberty, formal equality, and the erosion of the welfare state. Critical race feminists have further argued that the lack of state support for families disproportionately impacts racial minorities and that inequality is widening along racial lines. Here, Alstott's approach analyzes family and welfare jurisprudence and legislative developments in tandem to draw connections that reveal how the two fields maintain neoliberalism and prevent progressive attempts at redistribution. In so doing, she offers a valuable corrective to the isolated analyses that currently prevail. Elaborating the argument to include analysis of the structural impediments that minorities confront would complete the unfortunately dismal picture.

1. *See e.g.*, Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 Harv. L. & Pol'y Rev. 3 (2009).
2. *See e.g.*, Bruce Western et al., *Inequality Among American Families with Children*, *1975-2005,* available at http://scholar.harvard.edu/brucewestern/files/fqant08.pdf.

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