

THE HOLY FAMILY AND THE LAW

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ABSTRACT

Wherever the sacred appears it claims dispensation from the law. The exemption of domestic relations from legal regulation has often been associated by the courts with the sanctity of the family. Domestic sacredness can be construed in light of two alternative models of the family. According to the first model, the family constitutes a *communal body*: a sacred, formless fusion of individuals, a texture of interaction that would be impaired and violated by legal mediation. According to the second model, the family constitutes a quasi-sovereign *corporate body*: a thoroughly legal structure in which each individual organ plays a determined role, dictated by the family's own sacred, ancestral law. Both the corporate and communal models call for a certain degree of exemption of domestic relations from state regulation on account of their sanctity. The article revisits and develops the classical anthropological theory of the family as corporation – the theory of Maine, Maitland, Fortes and Kantorowicz.

1. INTRODUCTION

Hardly any value except human life has as often been described as sacred by the courts as domestic privacy. Frankfurter J proclaimed in *Martin v Struthers* that 'homes are sanctuaries from intrusions upon privacy', and Black J in *Gregory v Chicago* described the home as 'the sacred retreat to which families repair for their privacy'.¹ While individualistic, autonomy-based conceptions of privacy are familiar enough to contemporary readers,² my aim in this article is to articulate grounds for domestic privacy which stem from religious or quasi-religious dimensions of the family. The argument will extend beyond questions of domestic *privacy* and bear on the relations between family and state in general.

The first section sketches a model of the family as a pocket of sacred, lawless fusion, opposed to the state and to civil society as spheres of secular, pragmatic interaction among alienated and autonomous individuals. These public spheres of interaction will be described in the second section. It will be argued that *corporate bodies*, such as the state, are

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organized in a way that enables and requires an advanced degree of legally mediated separation among their organs. The third section argues that the family, too, can be seen as a corporate body. Once the family is seen as a corporation rather than a formless body, domestic relations appear to be legally mediated. However, the corporate model of the family entails a certain immunity of the family from legal intervention as did the model of the family as a lawless union: as a *separate* corporation, the family constitutes a distinct, quasi-sovereign jurisdiction. The state cannot regulate domestic relations without impairing the corporate identity and dignity of family members.

2. THE DOMESTIC AND THE SACRED

A powerful experience shaping the compound idea of privacy is that of domestic sacredness. As the opening quotations indicate, it is not the right to privacy but the domestic space itself which the courts view as sacred. The domestic sphere seems to have accommodated throughout history an *immediate* experience of the Sacred, rarely attainable in the public sphere.³ The contrast between private and public religious experience – between presence and absence of the Sacred – lies at the core of the private/public distinction.⁴ While the private sphere is permeated with sacredness, in the public sphere the Sacred is worshipped from afar. Classic accounts of the high Middle Ages trace the consolidation of the private–public distinction to the process of secularization of public affairs.⁵ In other words, a public sphere becomes clearly differentiated from a private sphere once it purges itself of the Sacred. As Lefort writes: ‘The division of the body of the king (into private and public bodies – LB) . . . goes hand in hand with the division between royal (or imperial) and papal authority. . .’⁶

Most individuals, while anonymous in the public sphere, experience immediate participation in the Sacred through their roles in domestic routines and celebrations. Ordinary domestic relations are often depicted through religious metaphors and perceived as enactments of mythical scenes in a way which attests to the fusion of sacred and profane in the domestic sphere. Marian lyrics, in which ordinary family scenes are modelled on episodes involving Mary and Christ, provide a striking illustration of this phenomenon.⁷ While in the public sphere myth functions as a *distant* source of identity and motivation, periodically celebrated but ordinarily worshipped from afar thus leaving room for individual agency in mundane affairs, in the private sphere myth is continually enacted in archetypal relations and gestures.⁸ In the private sphere myth is not represented but lived. The distinction between public and private spheres corresponds, then, to the distinction

between theatre and ritual. While in theatre myth is *represented*, in ritual it is made *immediately present*. The spectacular core of the political testifies to its deconsecration: immediate, pre-political participation in the Sacred gives way to the group's political self-representation. As Derrida noted in his essay on Artaud, theatrical representation is distinguished from ritual and from the avant-garde performance by its inbuilt reference to an absent authority.⁹ The domestic sphere, by contrast, seems to constitute a realm of ritual participation, captured by sacramental conceptions of marriage.¹⁰ The individual's identification with and enactment of the Sacred within the domestic fold suggests the dissolution of individual agency and an expansion of the self. Interpersonal boundaries and bodily discipline are relaxed. The domestic presence of the Sacred consists in a symbiotic experience: an experience of the family and its domestic seat as a single, sacred body, in which all family members participate and which is often identified with the mother's body.

Norman Bryson's work on still life painting, though not concerned with questions of religion, illustrates from the perspective of art history the imaginary equation of the domestic sphere with an all-embracing maternal body.¹¹ Bryson detects in still life – for example, in conventional depictions of the threats posed by the domestic sphere – traces of the uncanny effect of that sphere. According to Freud, the uncanny is occasioned by threats of recurrence of primary fusion.¹² The uncanny effect of the domestic sphere testifies to the imaginary identification of that sphere with an all-enveloping body. It is family members' imaginary participation in this body which constitutes the domestic experience of participation in the Sacred.¹³

Insofar as the domestic sphere is sacred, it claims to lie beyond the reach of the legal system. In fact, presence of the sacred implies an exemption not only from temporal jurisdiction, but from law generally. Law and the Sacred seem to be mutually exclusive. To the extent that the royal body, the sacrificial victim, the clerical body, the carnival or the domestic sphere function as reservoirs of sacredness, they are exempt from the law. Thus, one of the means by which the sacredness of the *divine king* is established is imperative transgression.¹⁴ The clerical body – the body of the priest and the judge – may emit oracular statements of the law but its own sacredness and magical procedures are inherently transgressive, and exclude it from the realm of law's ordinary subjects.¹⁵ Throughout history, popular religion provided ample illustration of the deviance which accompanies different forms of immediate, ecstatic participation in the Sacred.¹⁶ In the household, too, due to the presence of the Sacred, legally regulated interaction among autonomous, historically situated subjects gives way to a timeless experience of interpersonal immediacy.

3. THE STATE AS CORPORATION

Law's reluctance to intervene in domestic relations can be partly explained by reference to their sacred dimension. According to this line of thought, state intervention endangers the matrix of domestic interaction and should therefore be minimized.¹⁷ The view of the home as a realm of sacred lawlessness goes hand in hand with a conception of the public sphere as a realm of legally regulated secular interaction. In the next section the foregoing account of domestic sacredness will be revised, but let us first concentrate on the public sphere. I would like to propose that the secular nature of the political sphere has to do with its *corporate* structure. According to historical accounts of the high middle ages such as Ladner's, Cheyette's and Berman's, the secularization of government and the ensuing differentiation between private (sacred) and public (deconsecrated) spheres were simultaneous with processes of corporate-formation.¹⁸

Classical theorists of the corporation from Maine and Maitland to Kantorowicz and Fortes have focused their attention on two fundamental features of corporate bodies: immortality and sovereignty. Corporations are immortal because their continuity is not hampered by the deaths of their individual organs. According to Kantorowicz's analysis, for example, the crown, or the public body of the king, is indifferent to the deaths of individual kings and retains its identity across generations. His analysis implies that sovereignty resides not in the private body of the king but in his corporate, public body. The king is obliged to defend and augment the inalienable possessions of the realm – they are not his own – an obligation that receives its clearest expression in the coronation oath. I would like to supplement this basic understanding of corporate bodies with the following claims, in order to shed light on the *secular* and thoroughly *legal* nature of corporate structures such as the state.

The corporate personality of the state is associated with its founding ancestors. This is hardly a surprising claim, but I would like to emphasize its importance. Numerous examples suggest that a corporation is identified with the historical or fictional person of the founding ancestor of the corporate group, such as the founder of a royal dynasty or liberator of a nation. In a fully developed state, the identity of the crown survives changing dynasties: the crown is then associated not with the founder of a particular dynasty but with national ancestors common to all dynasties. The nation state rests on the fiction of the common descent of all its organs; national, totemic symbols of common descent designate corporate entities and authorities.

The corporate-ancestral personality of the state is an absent, transcendent object of worship. Through its corporate personality – its mythical ancestors and

their multiple totemic representations – the group articulates itself for itself. According to Hegel and Durkheim, notwithstanding the differences between their approaches to religion, society's self-representation is its object of worship. If the corporate personality of the state is associated with ancestral figures – and ancestral law – and constitutes the self-representation of the group, it cannot fail to be sacred. Like Gods, corporations are transcendent: they are absent, invisible, external and superior to the group, and act through representatives. The religious dimension of political systems is inherent in their corporate structure.¹⁹ In the rituals of civil religion the corporate body of the state is worshipped. As the source of the identity and dignity of individual organs, ancestral-corporate authority is an object of political love and loyalty in addition to being an object of civil worship.

The corporate body originates in the projection of sacredness outside of the social. Corporations come into being through the projection of sacredness from within the social onto a transcendent realm.²⁰ Corporate-formation secularizes society: once sacredness is projected outside of the group, a temporal realm of pragmatic interaction can assert itself. While the corporate body of the State is a sacred object of civic worship, its sacredness suggests that everyday politics have been deconsecrated.

When sacredness is immanent to the group, ancestral (corporate) authority and its law are not recognized. Ultimate authority vests then in the sacred private body of a divine king, who is neither sanctioned nor constrained by ancestral law. The passage from divine kingship to one that is grounded in law can be understood in terms of projection: the private body of the king is deconsecrated and its sacredness projected onto the transcendent domain of the ancestral-corporate body. From this moment onwards, sovereignty vests in the corporate body of the King, in the dynasty or the realm as a whole. Kingship becomes hereditary: the king is seen as an ordinary mortal, an organ of a sovereign corporate order – the dynasty – and his rights as grounded in ancestral (corporate) law, not in personal charisma.

It is the sacred communal body that is projected outside the group and transformed into its corporate body. By the notion of the *communal body* I refer to the group as a simple, immanent unity that results from the dissolution of interpersonal boundaries. The communal body is the sacred fusion which comes into being during rites of passage, carnivals, natural disasters, fascist régimes, wars, revolutions, referenda, elections, and other instances of *communitas*.²¹ The projection of sacred communal fusion outside of the social and its transformation into a transcendent corporate body allow for an advanced degree of interpersonal separation and individual autonomy within society and for the emergence of secular spheres of interaction (see Figure 1). It amounts to a social acceptance of division, absence and transcendence.

It is through the legal institution of division that the communal body is kept away from the social. In order to project the communal body, and

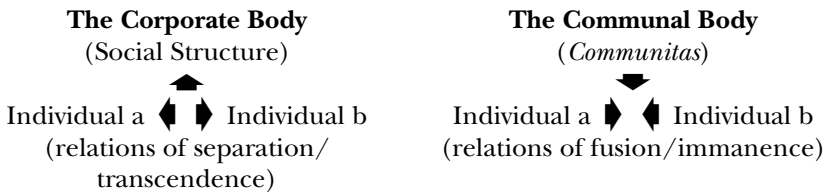


Figure 1. The Constructs of the Corporate and the Communal Body

thereby deconsecrate the social, numerous divisions and subdivisions – between classes, spheres of interaction, constitutional powers and individuals – are enforced by the law. Once the social is divided, its unity – its communal body – can only be found in a transcendent sphere. The law commands and entrenches interpersonal separation among organs of the corporation through the institution of individual rights and duties. By implementing rights and duties, the law confronts the expansionist attempts of the sacred communal body that abound within the community.

The corporate state and the domestic sphere. The preceding account of the domestic sphere as the seat of sacred fusion implies that the family can be regarded as a communal body. Indeed, the expulsion of the sacred communal body of the nation outside the spheres of politics and civil society into the realm of the ancestors leaves the domestic sphere – and the group's clerical caste – impregnated with sacredness. The distinctions between domestic sacredness and public secularity and between clerical and temporal powers count among the pivotal categories of social structure. Together with other divisions and subdivisions, they secure the projection of the communal body and thwart a marriage of political power with the sacred, which would have dissolved social structure and generated a state of ecstatic *communitas*. The sacredness of the domestic and clerical spheres is compatible with stable social structure because of their lack of political power.

The political and domestic realms are interdependent. The Political is premised on the relegation of fusion and immediacy into the private sphere.²² Work in group psychology has indicated that the domestic sphere, for its part, needs the larger, external structure to contain its aggression and represent objective normative limits.²³ Familiarity and intimacy within the private sphere depend on the system of reciprocal projections between the two spheres.²⁴

The corporate body and the communal body correspond to social structure and communitas respectively. In earlier work I proposed to read into Turner's classical distinction between social structure and *communitas* a few distinctions which Turner himself did not consider.²⁵ One is the psychoanalytic distinction – which can be found in the works of Fromm and Klein, for example – between relations of interpersonal separation

and mutual recognition among individuals, on the one hand, and relations of violent fusion, on the other.²⁶ Another distinction is the theological distinction between absence and presence. The combination of these two characterizations entails an account of social structure as absence of fusion, and of *communitas* as a presence of fusion, to which I referred above as the *communal body*.

The distinction between corporate and communal bodies captures, then, the differences between social structure and *communitas*. The communal body is an immanent presence of the sacred which involves the dissolution of interpersonal boundaries, while under social structure it is projected, transformed into a corporate body and worshipped from afar by individual subjects. Interaction within social structures takes place between individuated members and is mediated by their concrete, differentiated, normative social roles. In *communitas*, division, diversity and secularity are not tolerated. Every individual partakes in the communal body and is thereby consecrated. No room is left for profane everyday life. The absence and expectation which burden and animate ordinary human existence are replaced by immediate presence.

The corporate order is thoroughly legal. In the passage from *communitas* to social structure, from an immanent communal body to a transcendent corporate body, the law comes into being. Law is always seen as prescribed by the ancestral-corporate authority of the group, and hence cannot be found in *communitas* as the corporate body dissolves into a communal body. Legal systems emerge within corporate frameworks. Law-giving is the predominant function of the corporate-ancestral authority: as both Judaism and Protestant Christianity demonstrate, albeit their differences, the more an authority is transcendent (ie corporate) the more its function is reduced to that of law-giving.

The law not only divides the corporate group but becomes the embodiment of corporate unity by virtue of its very function as the agent of social division. Since corporate-ancestral authority is manifested primarily through its laws, the unity of a corporate group is first and foremost expressed through the unity of the law that defines and regulates it. The law of the corporate group functions as a principal symbol of corporate identity, dignity and power.²⁷ It displays the group's collective (corporate) will, interest and action. Thus, the transformation of the communal into a corporate body and the concomitant consolidation of individuality do not eliminate collective agency but displace it onto the corporate realm. While *communitas* does not allow for individual agency, in social structure individual and corporate agency exist side by side. The state, like any other corporate body, acts as a single person while regulating its internal affairs and its relations with other corporate bodies. State decisions and actions can be seen as authored by each of its individual organs. At the same time, the state is

premised on an advanced degree of interpersonal separation which finds in civil society its most blatant realization.

4. BACK TO THE FAMILY

The contrast, in which we sought to ground the relative immunity of the family, between the state as a legally regulated corporate body and the family as a lawless communal body hardly bears examination. The theory of the corporation applies to the family as readily as it applies to the state. Family and state are non-contractual pockets of corporate structure and objective identity in the midst of the open economic arenas of modern civil society, in which individuals are constantly re-positioned independently of objective structural allocations.²⁸ Like the state, the corporate family is a legal structure that rests on religious or quasi-religious premises.²⁹ As corporations, families retain across generations an identity that is defined through different forms of reference to historical or fictional ancestors: the family name itself constitutes such a reference. The family cannot be adequately described as a formless, sacred fusion: it is an articulate structure in which individual organs are given differentiated roles. Moreover, the most important processes of individuation take place within the family. As a *projected, displaced* unity, the legal-corporate structure of the family makes possible interpersonal separation among family members, while differentiating them, as a distinct body, from the rest of society. While communal bodies have only blurred boundaries, the corporate structure of the family clearly demarcates it from society at large.

The following principles state the identity of corporate bodies and kin groups, and conclude the foregoing provisional account of the corporation.

Relations of kinship can only be instituted through corporate structures. It is a basic tenet of psychoanalytic thought that filiation – the fact that children have parents – is at the same time the ultimate source of individual identity and of disturbances to identity. Through the corporate form, filiation is reconciled with interpersonal separation and individual autonomy, and the dangers of intergenerational violence and fusion – amply recorded in the work of Melanie Klein – can be mitigated if not wholly overcome. Premised on the projection – the simultaneous distancing and preservation – of unity, the corporate form reconciles individual autonomy with the state of being an organ, an extension, of a collective body. Kinship and individuality co-exist only within the juridical framework of the corporation.

Organs of corporations are kin. This principle complements the preceding one: not only are all kin-groups corporate, but all corporations are structures of kinship. Organs of corporations are kin not only because the corporation is associated with the figure of a common ancestor but

also because they are all extensions of the same body. The Ashanti made this idea explicit in formulations charged with psychoanalytic meaning:

Thus when the Ashanti define the lineage as being 'one person' they are thinking of it as if the founding ancestress were eternally present in her descendants, multiplied and replicated but still one and the same, much as a tree (to which a lineage is often compared) is the same tree however many branches it proliferates.³⁰

This is a precise formulation of the psychoanalytic significance of the corporation as a transcendent, collective maternal body that retains its identity through its individual extensions. 'Full matrisiblings are "one person, of one womb", a corporate unit in the narrowest sense, and sibling succession expresses the recognition of this indivisible corporate identity of the sibling group...'³¹

As membership in a corporation, citizenship denotes a bond of kinship. States initiate their citizens into civil religion, that is, into a shared ancestral-national mythology and rituals which enact this mythology. The sharing of myth and ritual implies a bond of kinship.³² All citizens partake in the body of the nation's ancestors, a transcendent corporate body celebrated by the myths and rituals of civil religion. The paternal function of the State features abundantly in official representations and is explicitly recognized by the law.³³ Psychoanalytic studies of politics amply support the analysis of the Political as an institution of kinship.³⁴ Leaders continue to epitomize traditional, national self-images, and some Western constitutions still restrict eligibility for certain high offices to members of a particular religion, for example.³⁵ Perhaps the generally recognized form of acquisition of citizenship through marriage provides further evidence for its association with kinship. The symbolic role of family ancestors diminished as the state – the nation state in particular – gradually colonized and almost monopolized genealogical claims and rights. The modern state asserts to an outstanding degree a parental interest in the welfare of individual family members, and it is arguably this parental/ancestral status which facilitates the performance of civil marriages on the part of the state. (Post)-Modern multicultural states continue to represent and exercise ancestral authority. The phenomenon of dual and multiple nationality has not developed to an extent that would imply a fundamental transformation of the nature of citizenship.³⁶

Werner Sollors drew an analogy between the family and the state not in terms of descent but in terms of consent. 'American allegiance, the very concept of citizenship developed in the revolutionary period was – like love – based on consent, not descent.'³⁷ Sanford Levinson illustrated Sollors' analogy between state and the family by invoking parallel features of marital vows and political oaths.³⁸ However, the vow

does not suggest the substitution of descent by consent. If citizenship and the family are premised on consent it is because the social contract in itself assumes descent. Vows in particular are anchored in trust or rite that presuppose a bond of symbolic kinship. Ideals of political love and loyalty suggest the identification of the state with ancestral authority. The account of the state as an institution of kinship does not privilege communitarian conceptions of politics over liberal or republican ones. The object of proper political love and loyalty is the absent corporate body and its institutional representations, not the anarchic and agitated communal body. Communitarianism and fascism, notwithstanding their differences, conceive of society as an immanent communal body and suggest a type of political love which political thinkers such as Arendt were right to criticize.

5. FAMILY AND STATE AS DIFFERENT JURISDICTIONS

Once the family is viewed as a legally regulated corporate structure, a different ground for its relative exemption from state jurisdiction suggests itself. The family is shielded from the state not as a lawless reservoir of sacredness but as an autonomous jurisdiction. It is not the contrast but the analogy between domestic and public spheres of interaction which warrants the latter sphere's reluctance to intervene in the former. The normative-corporate structure of the family is grounded in the natural law-giving authority of its ancestors; it does not derive from state legislation.³⁹ The corporate form of the family is self-grounded. Like all corporate bodies, every family is premised on the authority of its ancestors, the ultimate sources of its law, dignity, and of the intergenerational love and care that are transmitted within it.

As a corporate structure, the state is premised on the same corporate principles – such as the idea of ancestral law and authority – which found the family. Sanctioned by the same first principles, the family and the state are autonomous in respect to each other. As a principle on which the state rests, the principle of corporate-ancestral authority entails the natural limits of state jurisdiction. It requires that the state recognize the family as an indivisible, autonomous corporate body and a distinct jurisdiction. This autonomy can be accorded in any period only to families which meet the prevailing hegemonic image of the family. Throughout history states propagated and enforced hegemonic images of the family.⁴⁰ Notions of family privacy and autonomy are thus largely relative to changing hegemonic representations of the family. The principle of corporate autonomy does not exclude the enforcement of standards which are taken to be definitive of the very idea of the family.

The various doctrines of domestic privacy, whether in criminal law, civil law, constitutional law, or the law of evidence, are premised

on a conception of the family as a body, or will, that is both indivisible and autonomous.⁴¹ The family forms a single body whose corporate will coincides with the will of each of its organs. It is autonomous by virtue of being licensed by its own corporate, ancestral authorities. The corporate structure of the family requires that certain issues – for example, issues related to the upbringing of children⁴² – be left to its discretion, and that certain interests, ends, commitments and decisions of the family be attributed, by virtue of their corporate nature, to each family member. The traditional immunity of parents in tort law, for example, reflects both ideas of corporate indivisibility and autonomy.⁴³ It expresses the notion that parental discretion cannot be easily overturned by society, and that it is normally exercised in the name of the collective, corporate will and interest of all family members.

The analogy between the corporate structure of the state and the family suggests a more concrete analogy between state and family immunities. The comparison of these immunities merits a thorough study, which may greatly enhance our understanding of the two institutions. In the context of both family and state there is the idea that certain actions of certain authorities incarnate corporate sovereignty, and are both non-justiciable and authored by the corporate group as a whole. The grounds behind the traditional immunities of parents and the crown in torts, for example, partly overlap.⁴⁴ Both immunities reflect the ideas of corporate unity and sovereignty. Contrary to our democratic intuitions, political authority is akin to parental authority: it rests on the fiction of having been empowered by an external, ancestral, corporate authority whose sovereign will it embodies and to which it remains answerable. The king embodies the corporate personality of the group, the one which transcends the separation of powers and whose will makes law. It was rarely contested that kings are bound by the fundamental principles of the corporate structure, but not by the same laws and tribunals that govern ordinary citizens. The theatrical foundation of the law requires the embodiment of sovereignty by legislative and executive institutions that are free from the forms of legal supervision that apply to the society.⁴⁵ Royal inviolability developed into a system of immunities enjoyed by various state agencies and office-holders and into notions of non-justiciability grounded in the sovereign and collective nature of state action. This system still culminates in the comprehensive royal or presidential immunity, which cannot be revoked during office as sovereignty is concretely manifested through the well-being of the royal body.⁴⁶

6. GROUNDS FOR AUTONOMY

Once the notion of the family as a corporate order has been introduced, the question arises as to why the legal system should acknowledge this

symbolic structure. Two answers, implicit in the characterization of the family as a corporate body, readily suggest themselves. According to the first answer, violation of the autonomy of a corporate body impairs the welfare of its individual organs. According to the second answer, the autonomy of the family conditions the possibility and stability of the rule of law and social structure at large.

A. Corporate Autonomy and Individual Welfare

Contrary to atomistic views of dignity and autonomy, individuals derive their dignity and identity from corporate reference-groups such as the family. Legal intervention in the decisions, practices and commitments of a family, or in domestic relations, impairs – sometimes irreversibly – the dignity and integrity of the family as a corporate body. Whether in civil disputes among family members, criminal proceedings following domestic violence, denials of parental custody rights or other paternalist interventions on the part of welfare agencies, it is the corporate body of the family first and foremost that is assaulted by state intervention. The personal predicament of individual family members stems from the violation of their corporate identity. While some family members may be affected by a certain legal measure more acutely than others, the dignity and identity of all family members are at risk because these derive from their corporate membership.

Individual welfare can necessitate, as much as it can exclude, state intervention in families which generally conform to the hegemonic model of the family. As a ‘meta-corporation’ and *parens patriae*, the State – the modern state more than ever – is responsible for the welfare of its organs and should interfere in domestic relations when necessary.⁴⁷ Relations within the family can impair the dignity and identity of family members to such an extent that very little remains to be damaged by legal intervention. In less extreme cases of psychological or physical domestic violence, legal intervention remains amply justified. But in such cases the fact that the dignity of the victims themselves derives from the status of the family as a self-regulating body has to be taken into account and given some weight.

B. The Structural Function of the Autonomous Family

In addition to affecting the welfare of individual family members, violation of the integrity of the family can in certain circumstances undermine the stability of social structure. In *Totem and Taboo* and *The Ego and the Id* Freud suggested that descent – from one’s parents and from ancestral, mythical figures with which parents are associated – constitutes the core of individual identity.⁴⁸ The nation-state asserts the shared descent of all its organs *vis-à-vis* other nations and thereby

provides citizens with an important component of their identity. However, by treating citizens as identical legal subjects the state fails to differentiate them from each other. As a system of individual rights and duties, the legal system lays down high standards of individual autonomy, but it is unable to provide citizens with concrete differentiated identities because of its generality. Such identities are drawn from familial and communal memberships.

Without the family, the legal system would be unable to expel the communal body outside of the social and secure individual subjectivity. Without concrete familial identities that differentiate between them, individuals would disappear into a single national body. The family asserts the exclusive unity of its organs in a way which differentiates them from other citizens, while instituting – with the help of the legal system – their respective separateness within the family fold. As Fortes writes:

Every member of a society is simultaneously a person in the domestic domain and in the politico-jural domain. His status in the former receives definition and sanction from the latter. Jural infancy is structurally located in the domestic domain, but its character is defined by norms validated in the politico-jural domain.⁴⁹

The simultaneous inscription of the subject under two competing jurisdictions and foci of commitment and worship makes subjectivity possible. Private and public realms are allowed to interpenetrate only during the suspension of subjectivity in *communitas*.⁵⁰ Once the corporate structure of either state or family founders, the disintegration of the other corporate sphere is imminent: none of the corporate domains can guarantee on its own the projection of fusion and the institution of subjectivity. Where the state infringes upon the proper domain of the family it cannot maintain its own corporate structure: citizens disappear into a single political body, relations of interpersonal separation and recognition are replaced by violent fusion. When the subject is implicated in two separate libidinal attachments, when one's domestic attachment is complemented by an extra-marital affair with institutions of justice,⁵¹ neither attachment consumes individuality in the flame of total union. Fascism provides the clearest illustration of the correspondence between public invasion into and disempowerment of the family and dissolution of individual autonomy.⁵²

The roots of fascism's aversion to the family lie in its repudiation of superimposed interdictions and limits and desire to eradicate ancestral law. Under fascism, private and public spheres disappear into an omnipotent, lawless communal body devoid of inner divisions and external boundaries. The fascist communal body conceives of itself as the ultimate source of law in a way which inevitably leads to the violation

and instrumentalization of the family. Under non-totalitarian regimes, the polity subjects itself to a superimposed ancestral law which requires recognition of the corporate autonomy of the family and of the multiplicity of conflicting individual commitments. In humane social structures, the family is recognized as a self-grounded sphere of self-realization which is good in-itself and which cannot be wholly instrumentalized by the state.

The case of totalitarian regimes does not entail that state regulation of domestic relations is inherently totalitarian. Intervention in defence of individual welfare can be fully justified as long as the state takes into consideration the value of the corporate integrity of the family and does not attempt to eliminate the private, competing sphere of human self-realization. While in many cases state intervention inevitably offends the corporate dignity and identity of family members, such consequences do not render regulation totalitarian, even where the state's policies are excessively paternalistic. Totalitarian dissolution of individual autonomy results from denial of the inherent authority and value of the private realm and from complete subordination of the private sphere to public ends.

7. THE COMMUNAL AND CORPORATE BODIES AS TWO MOMENTS OF THE FAMILY

The corporate nature of the family does not entirely discredit its initial characterization as the dwelling-place of a single sacred body. As Berman's depiction of the Church suggests, the corporate and communal aspects of corporate bodies coexist while alternating in their dominance:

It is generally recognized that prior to the late eleventh century the material and corporative sides of the church were fused, to a much greater extent than they were later, with its spiritual and sacramental sides. . . Distinctions between the sacred and the profane were much less pronounced. The jurisdictional element of the church's law was viewed as an integral part of the sacramental element, which embraced not only such liturgical events as baptism, marriage, and ordination but also an undefined variety of moral and spiritual acts and rites.⁵³

While communal aspects are dominant in the family, corporate, juridical aspects are particularly pronounced in the state because of the relatively anonymous and abstract nature of membership in the state, its monopoly over violence and its function as the guardian of objectivity. Once these functions have been largely projected onto the state, the family can cultivate its familiar, subjective, lenient aspects, while retaining its broad corporate structure.⁵⁴ In a similar vein, Hegel

conceived of the family as a bond of immediate substantial unity, which nevertheless has an objective legal structure. Even if the characterization of the family in terms of sacred, lawless fusion proposed in the first section is tenable only in a highly qualified form, the difference between private and public spheres lies in their different positions *vis-à-vis* the sacred: while both family and state are structured as corporate bodies, the family offers a more immediate experience of the communal body, delineating the limits of public reason and embodying its silent, sacred Other. The immunity of intimate relations which do not conform with hegemonic models of the family and the general association of privacy and transgression largely derive from this communal dimension of the domestic sphere.

Among the ideas that make up our notion of the family feature, then, two contrasting immunities: the inviolability of the king or president – and of lesser state agencies – as prototypes of lawful, human existence, and the benefit of the clergy, as a lawless reservoir of sacredness, corresponding to the corporate and communal aspects of the domestic sphere. While these immunities are often outweighed by arguments in favour of state intervention, they have been widely regarded as fundamental concepts of legal systems. Certain traditions in political, legal and social thought argued that the very idea of law is grounded in the notion of ancestral and parental authority.⁵⁵ Pierre Legendre's monumental work in recent decades traces the different mechanisms through which categories of kinship introduce the subject to law and limit.⁵⁶ Popular and dogmatic representations of the law regularly suggest its association with parental and ancestral authority. The hostility of populist-fascist regimes to the very idea of law is manifested in their repudiation of ancestral authority in the political sphere through the institution of divine kingship, and in their degradation of parental authority in the domestic sphere.

Like the general idea of law, the jurisdiction of every legal system is anchored in the principle of ancestral, corporate authority. Each legal system is premised on the constitutive principles of corporate structures, such as the idea that sovereignty is corporate, the principles of rule of law and separation of powers – which provide that all human power be limited by law, and thus guarantee the transcendence of sovereignty – and the principle of parental authority. These principles are implicit in official totemic representations of sovereignty, and thus cannot be consistently denied by any legal system. The Preamble to the Canadian Bill of Rights offers a concise articulation of certain constitutive principles of corporate structures, such as the supremacy of God (ie of the corporate person), the freedom of the individual and the family, and the rule of law.⁵⁷ These principles define the corporate form and condition the stability and civility of social structures. They reflect the recognition that human individuality can prosper only under a

superimposed ancestral-corporate law which applies equally to all humans, proscribes manifestations of sanctity but its own, and postulates the corporate autonomy of the family.

NOTES

¹ *Martin v Struthers* (1943) 319 US 141, at 153; *Gregory v Chicago* (1969) 394 US 111, at 125. Douglas J asks in *Griswold v Connecticut* (1965) 'Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred'. [381 US 479, at 485–86].

² The view of privacy as a right of discrete individuals was endorsed in *Eisenstadt v Baird* (1972) 405 US 438. For an analysis of this decision, see J. L. Dolgin (1994) 'The family in transition: From Griswold to Eisenstadt and beyond', 82 *Georgetown LJ* 1519.

³ On the sacredness of the household, see M. Eliade (1959) *The Sacred and the Profane*, New York: Harcourt 50ff. On the contrast between domestic sanctity and public freedom, see H. Arendt (1958) *The Human Condition*, Chicago: The University of Chicago Press 29–30.

⁴ With the growing dissociation in the course of modernity between civil and revealed religion, the latter has been largely stripped of its official status and relegated to the private sphere. The modern privatization of revealed religion rested on an already existing, pre-modern, structural dichotomy between private and public forms of religious experience. On the privatization of religion in modernity, see T. Luckmann (1967) *The Invisible Religion*, London: Macmillan.

⁵ On the emergence of a private–public distinction and the secularization of government in the aftermath of the Gregorian reform, see F. L. Cheyette (1978) 'The invention of the state' in B. K. Lackner (ed) *Essays on Medieval Civilization*, Austin: University of Texas Press, 143–78. Ladner noted that the separation between church and state in the course of the Gregorian Reform coincided with a growing distinction between private persons and public roles: Church and State as institutions at the same time replaced pope and king and became more sharply differentiated from each other. See G. Ladner (1983) 'The concepts of "Ecclesia" and "Christianitas" and their relation to the idea of papal "plenitudo potestas" from Gregory VII to Boniface VIII' in *Images and Ideas in the Middle Ages: Selected Studies in History and Art* Vol II. Rome: Edizioni di storia e letteratura, 487, 492.

⁶ Claude Lefort (1988) *Democracy and Political Theory*, Cambridge: Polity Press 252.

⁷ Similarly, as David Herlihy pointed out in *Medieval Households*, relationships with unordinary sacred figures, such as the relationship between female saints and their followers (p 122), or between the female saint and Christ (pp 115, 118, 120), were typically understood as relations of kinship. '...the spiritual families led by holy women, who were sources of divine knowledge and exhorters to religious perfection, imitated the natural family where presumably mothers assumed a comparable if less visible role in the religious training of children...' D. Herlihy (1985) *Medieval Households*, Cambridge, Mass: Harvard University Press 123. On spiritual motherhood, see also J. T. Shulenburg (1998) *Forgetful of their Sex. Female Sanctity and Society, CA. 500–1100* Chicago: The University of Chicago Press 261.

⁸ Myth functions in the public sphere as a static, *distant* model and an *absent* reservoir of sacredness. During transitional and chaotic episodes of ecstatic presence, to which anthropologists refer as 'mythical time', myth entirely dissolves in order to be refashioned: the transitional episode will figure in a new mythology which will crystallize in the course of the return from *communitas* to normal structure. On mythical time, see M. Eliade (1954) *Cosmos and History*, Princeton: Princeton University Press; A. Falassi (ed) (1987) *Time Out of Time*, Albuquerque: University of New Mexico Press; V. Turner (1985) 'Images of anti temporality' in *On the Edge of the Bush*, Tuscon: University of Arizona Press 227–45.

⁹ Derrida, J. (1987) 'The theater of cruelty and the closure of representation' in *Writing and Difference*, Chicago: The University of Chicago Press, 232 at 235.

¹⁰ For a highly informative survey of sacramental and Calvinist models of marriage, see J. Witte, (1997) *From Sacrament to Contract*, Louisville: Westminster John Knox Press.

¹¹ Bryson, N. (1990) 'Still life and "feminine" space' in *Looking at the Overlooked. Four Essays on Still Life Painting*, London: Reaktion 136–78.

¹² Freud, S. (1953–74) 'The uncanny', *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, London: Hogarth Press (hereafter: *SE*), Vol 17, 217–53. Melanie Klein's work brought to light the dominant experience of persecution during the stage of primary fusion. Representations of the private sphere, such as the paintings studied by Bryson, alternately express its threatening and nourishing aspects. See also F. E. Dolan (1994) *Dangerous Familiars: Representations of Domestic Crime in England 1550–1700*, Ithaca: Cornell University Press 220.

¹³ Bryson remarks that the domestic sphere is depicted in still life painting as a threat for the historically active, restless subject, due to its stagnation. The sacredness of the domestic sphere excludes it from the temporal world of deliberation and action. The Sacred is indifferent to history: it is self-contained and self-sufficient knowing neither deficiency nor development. Marked by a salutary indifference to changing political, ideological and theological agendas, domestic religiosity is particularly resistant to historical change. It is intertwined with traditional everyday practices, untouched by time or subjectivity. On the endurance of domestic religiosity, see G. Gadbois (1992) "Vous êtes presque la seule consolation de l'Église". La foi des femmes face à la déchristianisation de 1789 à 1880' pp 301–27 in Jean Delumeau (ed), *La Religion de ma mère*, Paris: Cerf; V. Lossky and N. Lossky (1992) 'Transmission de la foi par les femmes en Russie soviétique' pp 373–84 in Jean Delumeau (ed), *La Religion de ma mère*, Paris: Cerf; M. Hovanessian (1992) *Le lien communautaire. Trois générations d'Arméniens*, Paris: Armand Colin.

¹⁴ Unlike the hereditary king who exercises rule in the name of ancestral law, the divine king is not subject to taboos in matters of sex and violence. In various societies, imperative royal incest established the king's sacredness. As the forbidden fusion *par excellence*, incest is a mark of sacredness. De-Heusch describes the notion of royal incest: 'Les Kuba du Zaïre soulignent que le roi est hors clan. Il est projeté au sommet de la société dans une solitude qui évoque celle des sorciers. Dans plusieurs Etats africains le Roi est censé réaliser au moment de son intronisation un acte sacré qui, dans la perspective clanique, est un acte de sorcellerie maléfique, un acte monstrueux: un inceste. Cet acte rituel est manifestement, au niveau de l'Etat, un acte magique de fondation, l'affirmation d'un ordre nouveau fondé sur la négation (partielle) de l'ordre familial ancien avec lequel il faut composer.' Luc de Heusch (1987) 'Pour une dialectique de la sacralité du pouvoir' in *Écrits sur la royauté sacrée*, Bruxelles: Editions de l'université de Bruxelles, 215, at 223. On the Roman *homo sacer*, a sacred individual bereft of legal rights and duties and associated with the phenomenon of divine kingship, see C. Lovisi (1999) *Contribution à l'étude de la peine de mort sous la république Romaine*, Paris: Boccard 13–64.

¹⁵ On the clerical body as a reservoir of sacredness and transgression, see L. Barshack (2003) 'Notes on the clerical body of the law' 24 *Cardozo Law Review* 3, 1151 at 1175.

¹⁶ Popular religion often responds to the need for immediate, non-institutional access to the Sacred through occasions of deviant *communitas*. Bakhtin and Scribner described alternative, deviant sacraments devised by popular Christianity in the 16th century. See M. Bakhtin (1968) *Rabelais and his World*, Cambridge, Mass: MIT Press, 7, 77. On Scribner's theory of *sacramentals* as magical invocations of the Sacred in the midst and service of everyday life, see R. W. Scribner (2001) *Religion and Culture in Germany (1400–1800)*, Leiden: Brill 350–5; on carnival deviance, see Scribner *ibid* at 65.

¹⁷ For an account of family privacy as based on the distinct nature of intimate relationships, see F. Schoeman (1980) 'Rights of children, rights of parents, and the moral basis of the family', 91 *Ethics*, 1, 6–19.

¹⁸ See n 5 above; H. Berman (1993) *Law and Revolution*, Cambridge, Mass: Harvard University Press. On the contribution of corporation theory to the growth of the State, see for example, J. P. Canning (1988) 'Law, Sovereignty and Corporation Theory, 1300–1450' in J. H. Burns (ed) *The Cambridge History of Medieval Political Thought*, Cambridge: Cambridge University Press 453.

¹⁹ This conception differs from Gierke's who viewed the corporation as a spontaneous, immanent association of individuals. See, O. Gierke (1934) *Natural Law and the Theory of the State*, Cambridge: Cambridge University Press. For a critique of Gierke, see H. Berman (1993) *Law and Revolution*, Cambridge, Mass: Harvard University Press 220.

²⁰ Kleinian theories in group psychology and various models of divine kingship and sacrifice, such as Burkert's and Girard's, conceive of authority and the social order at large as constituted by *projection* of incestuous and destructive urges outside of the social. See, for example, R. Girard (1977) *Violence and the Sacred*, Baltimore: Johns Hopkins University Press; W. Burkert (1983) *Homo Necans. The Anthropology of Ancient Greek Sacrificial Ritual and Myth* (trans Peter Bing) Berkeley: University of California Press 42. Contractualist foundation narratives such as Hobbes's and

Rousseau's, according to which the state originates in the voluntary transfer of natural rights and freedoms to the sovereign, capture the process of projection through which social structure is founded. Projection is not confined to a certain founding moment but constantly reproduces the social order.

²¹ The construct of the 'communal body' is based on Klein's account of the maternal body at the beginning of childhood as an intense, violent fusion of mother and child. According to Bion, group members experience the group as such a body. W. R. Bion (1961) *Experiences in Groups*, London: Tavistock 162.

²² Freud pointed out that mature sexual and emotional attachments are premised on the desexualization of the social bond, on a withdrawal from and exclusion of the group; 'Group psychology and the analysis of the ego' (1921) in *The Standard Edition of the Complete Psychological Works of Sigmund Freud (SE)* Vol 18, London: Hogarth, 67, at 140.

²³ In his discussion of the relationship between the couple and the group, Kernberg describes the interdependence and reciprocal projection between the two spheres. The couple projects aggression onto the group while the group projects its sexual aspirations onto the couple. 'A truly isolated couple is endangered by a serious liberation of aggression that may destroy it or severely damage both partners... Because the couple enacts and maintains the group's hope for sexual union and love, even though large group processes activate potential destructiveness, the group needs the couple.' O. Kernberg (1995) *Love Relations*, New Haven: Yale University Press, 181–2. As Kernberg writes elsewhere, 'In general terms, while the small group needs the couple, the large group tolerates it only within the limits of stereotyped convention, and the mob does not tolerate it at all. Jointly, all these group processes indicate the projection onto the couple of oedipal longings, and the expression of jealousy, envy and destructiveness. The couple, in turn, projects its shared oedipal and preoedipal conflicts onto the groups surrounding it, and attempts thus to discharge intolerable sexual and aggressive drive derivatives. A couple may provocatively display its closeness and intimacy to tease the group or to provoke it into retaliatory action (an expression of the couple's oedipal guilt). It is my belief that, because of these unconscious pressures, the couple needs the group. Just as the individual uses the group to project early dissociated or repressed aggression, sexuality, and superego-determined prohibitions against these, so does the couple'. O. Kernberg (1994) *Internal World and External Reality*, Northvale: Aronson 308.

Political thinkers as different as Hobbes, Hegel and Arendt regarded the political as the source of objectivity. While differing in their understanding of what 'objectivity' precisely means, they shared the view that the fabrication of objectivity is a principal function of the public sphere. Arendt (1958), for example, writes: 'To live an entirely private life means above all to be deprived of things essential to a truly human life: to be deprived of the reality that comes from being seen and heard by others, to be deprived of an "objective" relationship with them that comes from being related to and separated from them through the intermediary of a common world of things...' *The Human Condition*, Chicago: The University of Chicago Press 58.

²⁴ Arendt (Ibid 52, 75, 77) stressed on many occasions the inappropriateness of love in politics. See, also Arendt's reply to Scholem in R. H. Feldman (ed) (1978) *The Jew as Pariah: Jewish Identity and Politics in the Modern Age*, New York: Grove Press 245–7.

²⁵ See, for example, 'Death and the political', 47 *Free Associations* (2001) 435.

²⁶ In Klein's terms, symbiotic object relations consist in the reenactment of the primary position of violent fusion with the maternal body. For Fromm's account of authoritarianism as a state of violent communal fusion, see, for example, E. Fromm (1941) *Escape from Freedom*, New York: Farrar and Rinehart 141; (1947) *Man for Himself*, New York: Holt, Rinehart and Winston 151. According to Fromm, the weakly individuated self seeks empowerment simultaneously through fusion with powerful figures and through assertion of violence, whether as its perpetrator or as a victim who is empowered by disappearing into violent aggressors.

²⁷ On law as a component of national identity see, for example, Colette Beaune (1991) *The Birth of an Ideology, Myths and Symbols of Nation in Late-Medieval France*, Berkeley: University of California Press.

²⁸ Recent changes in family structure do not attest to the substitution of status by contract, but to a transformation of status which allowed more room for contract.

²⁹ On Roman domestic religion, see G. Dumézil (1996) *Archaic Roman Religion*, Baltimore: Johns Hopkins University Press 555ff.; D. G. Orr, (1978) 'Roman domestic religion: The evidence of household shrines', in H. Temporini and W. Haase (ed) *Aufstieg und Niedergang der römischen Welt*, Berlin: Gruyter, II 16.2 1557–91. Maine's description of family rites captures the religious dimension and ritual foundation of the legal relationship among family members as organs of a corporation; see H. S. Maine (1930) *Ancient Law*, London: Murray 211.

³⁰ M. Fortes (1969) *Kinship and the Social Order*, Chicago: Aldine, 172. For Fortes' further discussion of corporations, see 74–5, 119–21, 290–308.

³¹ Fortes n 30 above, 175.

³² As Fortes writes, 'Lineages and clans that celebrate the same festival are assumed to be kin of one another, in a broad sense, by virtue of the rule that people who sacrifice together must be kin'. Meyer Fortes (1987) *Religion, Morality and the Person: Essays on Tallensi Religion*, Cambridge: Cambridge University Press 45.

³³ See, for example, the doctrine of *parens patriae*. On the history and contemporary relevance of the doctrine, see George B. Curtis (1976) 'The checkered career of parens patriae: The state as parent or tyrant?', 25 *DePaul Law Review* 895 ; L. W. Yackle (1977) 'A worthy champion for fourteenth amendment rights: The United States in parens patriae', 92 *Northwestern University LR* 111.

³⁴ See, for example, D. Winnicott (1965) 'Some thoughts on the meaning of the word democracy' in *The Family and Individual Development*, London: Tavistock, 155–69; Pierre Legendre (1992) *Les enfants du texte: étude sur la fonction parentale des Etats*, Paris: Fayard.

³⁵ Article 6 of the Constitution of Denmark and article 4 of the Constitution of Norway postulate that the king shall be a member of the Evangelical-Lutheran Church.

³⁶ For a different view, see T. M. Franck (1996) 'Clan and superclan: Loyalty, identity and community in law and practice', 90 *American Journal of International Law* 359–83.

³⁷ Werner Sollors (1986) *Beyond Ethnicity: Consent and Descent in American Culture*, New York: Oxford University Press 6.

³⁸ On the analogy between political and marital vows, see S. Levinson (1988) *Constitutional Faith*, Princeton: Princeton University Press 114 ff.

³⁹ Various constitutions define the family as a *natural* association governed by natural rights and duties. Article 6 (2) of the German Basic Law states that: 'The care and upbringing of children are a natural right of, and a duty primarily incumbent on, the parents. The national community shall watch over their endeavors in this respect'. Article 29 of the Italian constitution provides that the family forms a natural association. Through the metaphor of nature constitutions recognize the independent jurisdiction of the family.

⁴⁰ While until the fairly recent past mainly marriage formation and dissolution and sexual conduct were regulated by the law, contemporary law increasingly assimilates the legal consequences of enduring intimate associations to those of marriage. At the same time, the state expanded the regulation of domestic relations and the upbringing of children, for example.

⁴¹ The common law formula according to which husband and wife constitute a single person made the legal personality of the wife disappear into that of the husband. See, G. Williams (1947) 'The legal unity of husband and wife', 10 *Modern Law Review* 16. For centuries, the fiction of the family as a single body made it almost impossible for spouses to sue each other under common law, even in order to enforce marital rights. For a detailed survey, see H. D. Lord (2001) 'Husband and wife: English marriage law from 1750: A bibliographic essay', 11 *S. Cal. Rev. L. and Women's Studies* 1, 43–7.

⁴² The constitutional right of parents was established in *Meyerv Nebraska* (1923) [262 US 390] and *Piercev Society of Sisters* (1925) [268 US 510]. For a criticism of these decisions, see B. B. Woodhouse (1998) 'Constitutional interpretation and the re-constitution of the family in the United States and South Africa', in J. Eekelaar and T. Nhlapo (ed) *The Changing Family*, Oxford: Hart 463, 473.

⁴³ On family cohesion and parental autonomy as the grounds for parental immunity in torts, see R. Bagshaw (2001) 'Children through tort' in J. Fionda (ed) *Legal Concepts of Childhood*, Oxford: Hart 127, 135–36, 143. Bagshaw avoids the term *immunity* and speaks instead of the courts' reluctance to impose certain duties of care on parents. See also G. D. Hollister (1981–82) 'Parent-child immunity: A doctrine in search of justification', 50 *Fordham Law Review* 489, 512, 516, 524.

⁴⁴ While the general immunity of the state in torts has been abolished in Britain and the United States shortly after World War II, many administrative actions and decisions – indeed those which can be regarded as exercises of delegated sovereignty – remain practically immune from civil liability. 'Policy' decisions, for example, as opposed to operational decisions, remain immune from liability in torts in both Britain and the United States. The rationales underlying this immunity restrict also the validity and enforceability of public contracts. On the liability of the state in torts and contract see P. W. Hogg (1989) *The Liability of the Crown* 2nd edn Toronto: Carswell. See also A.

W. Bradley and J. Bell (ed) (1991) *Government Liability: A Comparative Survey*, London: The British Institute of International and Comparative Law. For a recent collection of studies covering different areas of accountability of the Crown and its employees, see M. Sunkin and S. Payne (ed) (1999) *The Nature of the Crown*, Oxford: Oxford University Press.

⁴⁵ This conception of princely power can be found, for example, in John of Salisbury's *Policraticus*. According to the *Policraticus*, the prince – whom John equates with paternal authority – is distinguished from the tyrant by his respect for divine law. However, the prince is not an ordinary legal subject but *imago Dei*, and hence free of legal obligations. '...the prince is the public power and a certain image on earth of the divine majesty... Whatever the prince can do... is from God so that power does not depart from God but it is used as a substitute for His hand, making all things learn His justice and mercy.' John of Salisbury, *Policraticus* edited and translated by C. J. Nederman (1990) Cambridge: Cambridge University Press 28. On John's theory of the legal status of the prince, see T. Struve (1984) 'The importance of the organism in the political theory of John of Salisbury' in M. Wilkes (ed) *The World of John of Salisbury*, Oxford: Blackwell 303, at 312–3. For a classic discussion of the image of the king as *lex animata*, see F. Schultz (1945) 'Bracton on Kingship', LX *The English Historical Review* 136.

⁴⁶ In a recent decision, the French Cour de Cassation affirmed the immunity of the president against all criminal charges except high treason, on the ground that the president embodies the continuity of the Republic. [Assemblée Plénière, 10.10.2001 Bull. Plén. 11]. On the court's decision, see D. Chagnollaud (2001) 'La cour de cassation et la responsabilité pénale du chef de l'état ou les dominos constitutionnels', 117 *Revue du Droit Public* 6, 1605; X. Prétot (2001) 'Quand la cour de cassation donne une leçon de droit au conseil constitutionnel. A propos de la responsabilité pénale du Président de la République', 117 *Revue du Droit Public* 6, 1625.

⁴⁷ On the meteoric rise of child protection by the state as 'superparent' at the beginning of the twentieth century, see M. A. Mason (1994) 'The state as superparent' – in her *From Father's Property to Children's Rights. The History of Child Custody in the United States*, New York: Columbia University Press, 85ff.

⁴⁸ *Totem and Taboo* (1912–13), *SE* Vol 13, 1; *The Ego and the Id* (1923), *SE* Vol 19, 1, 31–7.

⁴⁹ M. Fortes (1958) 'Introduction' in J. Goody (ed) *The Developmental Cycle in Domestic Groups*, Cambridge: Cambridge University Press 1, at 12.

⁵⁰ On the opening of the family home outwards during the broadcasting of national rituals, see D. Dayan and E. Katz (1992) *Media Events: The Live Broadcasting of History*, Cambridge, Mass: Harvard University Press, 128, 132, 133.

⁵¹ On the complexity of attaining a divided libidinal attachment to the family and the larger group, see Freud (1930) *Civilization and its Discontents* in *SE* Volume 21 59, at 103.

⁵² As Legendre writes, '...if one reflects upon totalitarian techniques, one discovers that they all monotonously depend upon the elimination of what, in European history, constitutes the *staging of the limit* for the purposes of Reference itself: the distinction between what is public and what is private, the central notions of the theory of jurisdiction around which the genealogical power of the state was formed, *are the guarantee of the reproduction of the subject*. The bond of speech in our culture is lodged on the rock of the division between public and private...'. P. Legendre (1997) *Law and the Unconscious* (trans P. Goodrich), Houndmills: Macmillan 178. While hostility to the family and to law and structure generally is common to many totalitarian and revolutionary ideologies, extreme forms of fascism are unique in their attempt to perpetuate *communitas*; they refuse to establish structural categories, such as the private–public distinction, with the waning of a revolutionary phase. According to the Frankfurt School's studies of authoritarianism, the traditional bourgeois family produced individuals capable of resisting injustice, and was therefore inconsistent with Nazism and Fascism. Horkheimer, for example, wrote that 'the same economic changes which destroy the family bring about the danger of authoritarianism... family in crisis produces the attitudes which predispose men for blind submission... the modern family in fact produces the ideal objects of totalitarian integration...' M. Horkheimer 'Authoritarianism and the family today' in R.N. Anshen (ed) *The Family and Its Function*, New York: Harper, 359–74. According to Adorno (1974) 'the end of the family paralyzes the forces of opposition', *Minima Moralia: Reflections from Damaged Life*, London: Verso, 23. Winnicott argued that the capacity for democratic culture and participation is grounded in the family. See, D. W. Winnicott (1965) 'Some thoughts on the meaning of the word democracy' in *The Family and Individual Development*, London: Tavistock, 155–69. On Nazism's assault on the family, see L. Pine (1997) *Nazi Family Policy*, Oxford: Berg, 13–16, 30–50, 181–3. Pine discusses the Nazi policy of encouraging children to report 'misbehaviour' of their parents.

⁵³ H. Berman (1993) *Law and Revolution*, Cambridge, Mass: Harvard University Press, 201.

⁵⁴ Aquinas' classic statement recognizes the two-dimensionality of the family as a corporate body, i.e. the moment of indivisible unity and the moment of inner articulation into different organs. 'Right or just depends on commensuration with another person. . . a father is not compared to his son as to another simply, and so between them there is not the just simply but a kind of just, called paternal. . . A son, as such, belongs to his father, and a slave, as such, belongs to his master; yet each, considered as a man, is something having separate existence and distinct from others. Hence, in so far as each of them is a man, there is justice towards them in a way, and for this reason too there are certain laws regulating the relations of a father to his son and of a master to his slave, but in so far as each is something belonging to another, the perfect idea of right or just is wanting to them.' Aquinas *On Law, Morality and Politics*, Indianapolis: Hackett 142–3.

⁵⁵ On Filmer's and other attempts to ground political in paternal authority, see G. J. Shochet (1975) *Patriarchalism in Political Thought*, New York: Basic Books. See also P. Legendre (1989) *Le crime du caporal Lortie. Traité sur le père*, Paris: Fayard.

⁵⁶ Among Pierre Legendre's books, see, for example, *L'Inestimable objet de la transmission. Étude sur le principe généalogique en Occident*, Paris: Fayard, 1985; *Les enfants du texte. Étude sur la fonction parentale des États*, Paris: Fayard, 1992; *Le dossier occidental de la parenté*, Paris: Fayard, 1988; Goodrich, P. (ed) (1997) *Law and the Unconscious. A Legendre Reader*, Houndmills: Macmillan.

⁵⁷ The Preamble affirms that '...the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions,' and 'that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law. . .'