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See table of contents

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Article abstract

Decisions of the United States Supreme Court beginning with *Griswold* v. *Connecticut (1965)* have transformed family law in the United States. By characterizing the right to marry as a fundamental constitutional right and procreative decision-making as both a fundamental liberty interest and privacy right, the Court has "deregulated" the institutions of marriage and family.

During this same period the Court's approach to legal questions involving the rights of non-marital cohabitating couples as well as individual procreative decision-making has tended to blur legal distinctions between the family based upon marriage and other living arrangements. The widespread adoption of mutual consent and/or marital breakdown as grounds for the dissolution of marriage in the United States has significantly altered the social dynamics of marriage and further reduces distinctions between marriage and other living arrangements.

However, recent decisions by the Court in *Hardwick, Michael H., and Webster* point to a change of direction in the Court's view of privacy which may signal a willingness to tolerate greater community involvement in establishing protective regulation of the institutions of marriage and the family based upon it. The Court also appears to be in the process of significantly narrowing the constitutionally recognized right of privacy when viewed as a zone of autonomous decision-making for the individual or non-marital couple.

Constitution and Family in the United States*

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ABSTRACT

Decisions of the United States Supreme Court beginning with Griswold *v.* Connecticut (1965) *have transformed family law in the United States. By characterizing the right to marry as a fundamental constitutional right and procreative decision-making as both a fundamental liberty interest and privacy right, the Court has "deregulated" the institutions of marriage and family.*

During this same period the Court's approach to legal questions involving the rights of non-marital cohabitating couples as well as individual procreative decision-making has tended to blur legal distinctions between the family based upon marriage and other living arrangements. The widespread adoption of mutual consent and/or marital breakdown as grounds for the dissolution of

RÉSUMÉ

Les décisions de la Cour suprême des États-Unis, à partir de l'arrêt Griswold *c.* Connecticut (1965), *ont transformé le droit de la famille aux États-Unis. En qualifiant le droit au mariage de droit constitutionnel fondamental et le choix de procréer, de liberté fondamentale et de droit inhérent à la vie privée, la cour a procédé à la déréglementation des institutions de la famille et du mariage.*

Pendant la même période, l'approche de la cour face aux questions impliquant les droits des couples non mariés ainsi que le choix individuel de procréer est venue brouiller les distinctions juridiques entre la famille, fondée sur le mariage, et les autres modes de cohabitation. L'adoption répandue du consentement mutuel et/ou de l'échec du mariage

* This article is adapted from an address given in May, 1990, to the V Congreso Internacional de Derecho Eclesiástico del Estado held at the University of Navarra, Pamplona, Spain.

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comme motifs de dissolution du mariage aux États-Unis a considérablement altéré la dynamique sociale du mariage et a réduit davantage les distinctions entre le mariage et les autres modes de cohabitation.

Cependant, les récentes décisions de la cour dans Hardwick, Michael H. et Webster *traduisent un changement de cap dans la définition du droit à la vie privée. Cette nouvelle approche pourrait se révéler plus tolérante face à l'intervention accrue du corps social par le biais d'une législation protectrice de l'institution du mariage et de la famille qui en découle. Parallèlement, la cour semble aller dans le sens d'un rétrécissement du droit constitutionnel à la vie privée lorsqu'analysé sous l'angle de l'autonomie décisionnelle de l'individu ou du couple non marié.*

TABLE OF CONTENTS

INTRODUCTION

During the past 25 years, American family law has undergone nothing less than revolutionary change. Unlike many European nations which have undergone similar changes in legal policy regarding such issues as abortion, divorce, and parental rights, the changes in American law did not for the most part result from open parliamentary debate. Rather they were mandated by decisions of the national supreme court. Thus, in the United States the ability of democratic institutions, whether at the local or national level, to set family law and policy has been narrowly circumscribed by decisions of the United States Supreme Court.

The United States Supreme Court's decisions affect three basic issues: (I) the *ability* of the community to regulate and support the institution of marriage; (II) the *ability* of the community to provide legal distinctions between the family based upon marriage and informal living arrangements; and finally, (III) the *ability* of the community to provide social services in such a way as to support the institution of the family based upon marriage. I put forward these observations with one major *caveat*: family law in the United States is still in a stage of transition, especially in light of recent appointments to the Court; and, therefore, this article will conclude with observations regarding more recent cases which appear to signal a change of direction of the Court's jurisprudence (IV).

I. THE ABILITY OF THE COMMUNITY TO REGULATE MARRIAGE

An analysis of the contemporary Supreme Court's jurisprudence regarding marriage and family must begin with its 1965 case entitled *Griswold* v. *Connecticut*.[1] There, the Supreme Court ruled that the State of Connecticut's ban on the use of contraceptives by married couples was unconstitutional. Connecticut had defended its statute in *Griswold* by asserting that it was the judgment of the State that the use of contraceptives, even in marriage, was immoral. The Supreme Court disagreed. In its opinion, defending the "sacred precincts of marital bedrooms" through a new right of privacy, the Court stated:

> 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 [...]. It is an association for as noble a purpose as any involved in our prior decisions.[2]

1. 381 U.S. 479 (1965). For an analysis of the *Griswold* case, see R. BORK, "Neutral Principles and Some First Amendment Problems", (1971) 47 *Ind. L. J.* 1 and L. HENKIN, "Privacy and Autonomy", (1974) 74 *Colum. L. Rev.* 1410.

2. 381 U.S., p. 486.

By placing marital activity within a newly defined constitutional zone of autonomous decision-making, the Supreme Court sharply limited the authority of the state to regulate marriage. While obviously the landmark case in the area of human reproduction, *Griswold* is also an equally important decision in regard to the formulation and dissolution of marriage. Its implications for the regulation of the institution of marriage, especially when considered with the Court's opinion in *Loving* v. *Virginia*[3] is too often overlooked.

In *Loving* v. *Virginia*, the Court struck down the State of Virginia's long-standing criminal prohibition of marriage between persons of different races. Essentially, *Loving* presented the Court with the long overdue opportunity to apply the U.S. Constitution's standard of equal protection to prohibit racial classification in marriage. However, the Court was not willing to so limit its language. Instead, in what has been termed an "unnecessary addendum"[4] the Court declared the right to marry to be "a basic civil right of man".[5] By taking that additional step, the Court in *Loving* "created a new atmosphere for the further development in state law of the freedom to marry".[6] Together with *Griswold*, "the decision raise[d] a challenge to state regulation of marriage and the freedom to remarry after divorce".[7] Dean Robert Drinan, S.J., of Georgetown University Law School, for example, maintained that the Court's opinion in *Loving* recognized the "profound consensus in American society that the state and the law should say as little as possible about who should marry whom".[8] For Fr. Drinan, the *Loving* decision required "a complete rethinking" of American marriage law. According to him, *Loving* mandated a virtual abdication of the community regarding questions of marriage, for example, "a registration statute and *not* a marriage license law would be appropriate and preferable".[9]

3. 388 U.S. 1 (1967). See, W. WADLINGTON, "The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective", (1966) 52 *Va. L. Rev.* 1189.

4. J. ELY, *Democracy and Distrust: A Theory of Judicial Review*, Cambridge, Harvard University Press, 1980, p. 221.

5. W. WADLINGTON, *loc. cit.*, note 3, p. 12.

6. M. GLENDON, "Marriage and the State: The Withering Away of Marriage", (1976) 62 *Va. L. Rev.* 663, pp. 668-69.

7. H. FOSTER, "Marriage: A Basic Civil Right of Man", (1968) 37 *Fordham L. Rev.* 51.

8. R. DRINAN, "American Laws Regulating the Formulation of the Marriage Contract", (1969) 383 *Annals* 48, p. 49.

9. R. DRINAN, "The Loving Decision and the Freedom to Marry", (1968) 29 *Ohio St. L. J.* 358, p. 376.

Undoubtedly, the *Griswold* and *Loving* decisions had a substantial effect on the National Conference of Commissioners on Uniform State Laws during their drafting of the *Uniform Marriage and Divorce Act of 1970.*[10] Section 206 of the *U.M.D.A.* regarding solemnization and registration of marriages provides for the minimum of community involvement. It states, "If no individual acting alone solemnized the marriage, a party to the marriage shall complete the marriage certificate form and forward it to the (marriage license) clerk". The commentary explains that this provision "was designed to take account of the increasing tendency of marrying couples to want a personalized ceremony without traditional church, religious, or civil trappings". Thus, marriage by simple registration is one of the forms of marriage "ceremony" expressly provided for by the Act. Since the publication of the *U.M.D.A.*, cohabitating couples in a number of states may now marry by simply filing a certificate with the county clerk's office.

Another immediate consequence of the *Loving-Griswold* articulation of marriage as a fundamental right was a rethinking of state divorce legislation. Until 1969, when California became the first state to permit divorce on the basis of "irreconcilable differences, which have caused the breakdown of the marriage", a divorce could generally be obtained in the United States only on the grounds of spousal "fault", such as adultery, desertion, or cruelty. One year later, the concept of marital breakdown was incorporated in the *Uniform Marriage and Divorce Act.* By 1971, the Supreme Court had occasion to apply its notion of the fundamental right to marry directly to state regulation of divorce and remarriage. In *Boddie* v. *Connecticut*[11] the Court struck down a state requirement that indigent persons seeking a divorce were required to pay the attendant court costs as a condition of obtaining the divorce. Again going beyond consideration of the equal protection guarantees of the Fourteenth Amendment of the U.S. Constitution[12] the Court stated that such restrictions were an impermissible limit on the fundamental freedom to marry. The original freedom to marry had now become the freedom to divorce without cost.

Finally, in 1979, in *Zablocki* v. *Redhail*[13] the Court left little doubt that, having established marriage as a "fundamental right", it would not tolerate significant community limitations on the exercise of that right

10. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *Uniform Marriage and Divorce Act of 1970* (with 1971 and 1973 amendments). The American Bar Association approved the *U.M.D.A.* in 1974. For a copy of the *U.M.D.A.* and commentary see (1971) 5 *Fam. L. Q.* 205.

11. 401 U.S. 371 (1971).

12. The Fourteenth Amendment reads in part: "No State shall [...] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

13. 434 U.S. 374 (1978).

in regard to entry, exit, or re-entry into marriage. In *Redhail*, the Court struck down a Wisconsin statute requiring that previously divorced persons under a court-ordered obligation to support minor children be required to show as a condition for obtaining a marriage license that their re-marriage would not interfere with their ability to continue to support their children from the previous marriage. Writing for the Court, Justice Marshall cited *Loving* and observed that the freedom to marry is a fundamental liberty. He then articulated the following test to measure the constitutionality of community regulation:

> [W]e do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that *do not significantly interfere with decisions* to enter into the marital relationship may legitimately be imposed.[14] [emphasis added]

State "no-fault" divorce legislation when combined with the procedural restrictions imposed by the court in *Boddie* and *Redhail* establish a legal environment consistent with the notion of divorce at the will of one of the spouses as a fundamental constitutional right. The Supreme Court has not yet gone so far as to directly confront what constitutional limitations, if any, exist on the state's ability to restrict divorce to limited grounds, such as adultery, cruelty or desertion. Whether divorce, at the will of either spouse or on the ground of marital break-up, will be afforded the constitutional status of a fundamental right remains to be seen. It has been argued that the dissolution of marriage at the will of one of the spouses should enjoy full constitutional protection. In this view, "There is no protectable liberty interest in being married to the person of one's choice [...] it is the party seeking divorce whose interest in marital choice is primary; the state may not categorically defeat his interest by interposing the wishes of the non-consenting spouse".[15]

This view, of course, rests on the understanding that the Supreme Court's decisions beginning with *Loving* and *Griswold* have radically changed the legal nature of marriage. When marriage is "perceived as neither a sacrament nor a status necessarily assumed for life, the relationship contemplated by parties is not dissimilar from that of other longterm contracts, such as partnership, cotenancy, and sometimes employment".[16] The notion of marriage as simply a contract is not dissimilar from the nineteenth century *laissez-faire* view that an employment relationship of indefinite duration was in fact an employment at will and therefore terminable by either party for any or no reason at any time. Paradoxically,

14. *Id.*, p. 386.

15. L. STRICKMAN, "Marriage, Divorce and the Constitution", (1982) 15 *Fam. L. Q.* 259, p. 316.

16. W WEYRAUCH & S. KATZ, *American Family Law in Transition*, Washington, D.C., Bureau of National Affairs, 1983.

at a time when such employment relationships are more and more infrequent, this view is emerging as determinative in the area of domestic relations.[17] In short, we might say that the Court has abandoned *laissez-faire* economic policy while mandating *laissez-faire* family policy.

The view of marriage as a contract at will may express the expectations of certain individuals. But does it accurately reflect the intentions of the majority of persons who undertake the marriage commitment? For the most part, one suspects that the traditional aspects of the marital relationship will nonetheless survive. One spouse will most likely continue to forego advanced education, career objectives and extensive employment experience in order to provide for the care, nurture, and education of children. One spouse will usually continue to make substantial sacrifices in order to further the career of the other. Regardless of more egalitarian views of marriage, in all likelihood the task of raising children will continue to fall more directly on one of the two spouses.

Viewed in economic terms "a baby is a durable good in which someone must invest heavily long before the grown adult begins to provide returns on the investment".[18] It should be self-evident that the community has at least a rational if not compelling interest in fostering conditions in which it is likely that the heavy investment in the next generation is made. Does not the partner to a marriage who makes such a commitment in time and energy have at least a moral claim on the community to recognize and protect that commitment? Do not the children themselves, who we are now learning bear a substantial emotional and psychological trauma from divorce and its aftermath (including in may cases a significantly lower standard of living), have a minimum right to the continuation of their two-parent family which ought to be recognized and protected?[19] One might argue that it is precisely when marriage is viewed as a longterm contract that one should consider how often in the economic sphere agreements are unilaterally terminable at the will of one of the parties. And why it is that principles of equitable estoppel[20] might be applicable by analogy to protect the spouse who has faithfully performed under the agreement and whose reliance has

17. M. GLENDON, "The New Family and the New Property", (1979) 53 *Tul. L. Rev.* 697, p. 699.

18. J. SIMON, *The Ultimate Resource*, Princeton, Princeton University Press, 1981, p. 4.

19. See, *e.g.*, R. COCHRAN & P. VITZ, "Child Protective Divorce Laws: A Response to the Effects of Parental Separation on Children", (1983) 17 *Fam. L. Q.* 327.

20. "**Equitable estoppel**. The doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had [...]. The effect of voluntary conduct of a party whereby he is precluded from asserting rights against another who has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct". H. BLACK, *Black's Law Dictionary*, St. Paul, West Publishing Co., 1979, p. 483.

now become the occasion for a potential injury of unprecedented and unsurpassed dimensions.

According to Richard Posner, the Supreme Court has "simply 'deregulated' the family in much the same way that its discredited predecessors prevented states from regulating business. One can agree with the policy preferences of either or boths sets of justices while questioning the constitutional basis for their actions".[21] For many women, especially those with small children, this *laissez-faire* view of marriage has meant a new lifestyle best described as the survival of the fittest, thus marking a new social Darwinism. More than 13 million American women are raising young children without a father. According to a 1983 government report entitled, *A Growing Crisis: Disadvantaged Women and Their Children*, divorce and illegitimacy have become significant contributors (perhaps the most significant) to the growing number of women and children living in poverty in the United States. The report cites research findings that the increasing incidence of marital disruption and the extraordinary rise in unwed motherhood "are responsible for essentially all of the growth in poverty since 1970 [...] and that they show no signs of abating as the unwed birth and divorce rates continue to climb rapidly".[22]

One important aspect of this new feminization of poverty, which I think would more accurately be described as the *maternalization* of poverty, is that the economic consequences of divorce affect the spouses differently. A study conducted at the University of Michigan reported that while divorced men lost 11 percent in real income, divorced women lost 29 percent. More dramatic were results regarding the longterm consequences of divorce: among former spouses studied seven years after divorce, the economic position of former husbands improved by 17 percent while that of former wives decreased by nearly 30 percent.[23] The latest figures published by the Bureau of the Census indicate that families headed by never-married and formerly-married women account for 47 percent of the 7.6 million families with incomes below the poverty level.[24]

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21. R. POSNER, *The Economics of Justice*, Cambridge, Harvard University Press, 1981, p. 328; see also, L. STRICKMAN, *loc. cit.*, note 15.

22. UNITED STATES COMMISSION ON CIVIL RIGHTS, *A Growing Crisis: Disadvantaged Women and Their Children*, Washington, D.C., Government Printing Office, 1983, p. 62; see also L. WEITZMAN, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*, New York, The Free Press, 1985, and T. ESPENSHADE, "The Economic Consequences of Divorce", (1979) 41 *Journal of Marriage and the Family* 615.

23. UNITED STATES COMMISSION ON CIVIL RIGHTS, *id.*, p. 12.

24. UNITED STATES BUREAU OF THE CENSUS, *Current Population Reports: Consumer Income*, Series P-60, No. 145, Washington, D.C., Government Printing Office, 1984, p. 4.

II. THE ABILITY OF THE COMMUNITY TO MAKE LEGAL DISTINCTIONS BASED UPON MARRIAGE

Seven years after *Griswold* the Court found in *Eisenstadt* v. *Baird*[25] that the "sacred" precincts of the marital bedroom recognized in *Griswold* where really no more sacred that any other bedroom. "[W]hatever the rights of the individual to access to contraceptives may be", wrote Justice Brennan, "the rights must be the same for the married and the unmarried alike".[26] If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons is equally impermissible. The Court reasoned:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child.[27]

While those pleased with the Court's apparent recognition of the sacredness of marriage in *Griswold* were dismayed by the Court's holding in *Eisenstadt*, they may not have read the Court's opinion in *Griswold* with sufficient attention. In *Griswold*, marriage was "a coming together [...] intimate to the degree of being sacred". It was the "sacredness" of the intimate relationship within marriage which required protection, not the institution of marriage itself; and as the Court recognized in *Eisenstadt*, such intimacy may occur outside the marriage. With the *Eisenstadt* decision, the Supreme Court began to "blur the distinction" between the legal institution of marriage and informal, non-marital cohabitation.[28]

In addition to cases which involve the ability to regulate marriage and divorce, the Supreme Court has sharply limited the power of the community to define what constitutes a "family".

Perhaps the most important of these series of cases is *Moore* v. *City of East Cleveland*[29] in which the Court directly confronted the issue of whether a local community may even define the term "family" as an institution based on marriage and involving the immediate family of husband, wife, and children. Mrs. Moore, who was living with her two adult sons and their sons, challenged East Cleveland's zoning ordinance on the basis that it excluded her "family" and would force her to leave the community at considerable hardship. Parenthetically, it is worth noting that

25. 495 U.S. 438 (1972).
26. *Id.*, p. 453.
27. *Ibid.*
28. M. GLENDON, *loc. cit.*, note 6, p. 699.
29. 431 U.S. 494 (1977).

while the ordinance contained an explicit exception for cases of hardship, Mrs. Moore had refused to apply for the exemption. In its opinion, the Supreme Court found the city ordinance "senseless and arbitrary [...] eccentric [...] [and reflecting] cultural myopia".[30] Writing for the Court, Justice Powell stated, "We cannot avoid applying the force and rationale" of precedents such as *Roe* v. *Wade* and *Griswold* v. *Connecticut* "to the family choice involved in this case[31]. He concluded, "The Constitution prevents [the government] from standardizing its children–and its adults–by forcing all to live in certain narrowly defined family patterns".[32] Thus, the substantial reduction of the community's interest in regulating the institution of marriage accomplished in *Griswold* and *Loving* was extended by the Court's decisions in *Eisenstadt* and *East Cleveland* to restrict the ability of the community to differentiate between the family based on marriage and living arrangements which are not so based.

As suggested in *Moore* v. *City of East Cleveland*, the Supreme Court's decision in *Roe* v. *Wade*[33] (which virtually decriminalized abortion throughout pregnancy) has also had important effects upon the development of marriage and family law. This influence of *Roe* v. *Wade* derives chiefly from the fact that it reinforced and elaborated the right of privacy first articulated by the Court in *Griswold*. In *Roe*, the Court dealt solely with the question of the reproductive rights of women when confronted with state regulation. It did not consider whether the abortion decision could be shared between the spouses. That issue was brought before the Court after *Roe* when the State of Missouri passed legislation requiring the written consent of a husband before his wife could obtain an abortion.

In *Planned Parenthood of Central Missouri* v. *Danforth*,[34] the lower federal court accepted the justification by the State of Missouri for its action. Missouri argued first that marriage is an entity which traditionnally was subject to the state's regulation and control in order that the state might protect the integrity of the marriage unit. Missouri then argued that it was a reasonable exercise of its authority to promote the integrity of marriage by requiring mutuality of decision-making between husband and wife regarding child-bearing. However, the Supreme Court disagreed. It struck down the Missouri law, stating that "the State may not constitutionally require the consent of the spouse [...] since it cannot delegate to a spouse a veto power which the State itself is absolutely and totally prohibited from exercising".[35] Thus, with *Danforth*, we see the Court moving beyond *Griswold* and *Eisenstadt* to apply the rationale of *Eisenstadt*

30. *Id.*, pp. 507-08.
31. *Id.*, p. 501.
32. *Id.*, p. 506.
33. 410 U.S. 113 (1973).
34. 392 F. Supp. 1362 (1975).
35. 428 U.S. 52 (1976).

within the marriage relationship itself. *Griswold* established a right of privacy for the marital couple as opposed to interference by the state. *Eisenstadt* expanded this right of privacy to the non-marital couple. *Danforth* expanded the right of privacy within the marital relationship, no longer to protect the marital unit from government regulation but to erect a wall of separation between the spouses themselves. Thus, we see the language of *Eisenstadt* clarified by *Danforth*: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion so fundamentally affecting a person as the decision to bear or beget a child".[36]

III. THE ABILITY OF THE COMMUNITY TO PROVIDE SOCIAL SERVICES TO SUPPORT MARRIAGE

These constitutional trends have both directly and indirectly affected American social policy. The Supreme Court has substantially reordered the relationship between the family based on marriage and the scope of federal and state welfare programs.

New Jersey Welfare Rights Organization v. *Cahill*[37] was the first of two cases in which the Court struck down considerations of "legitimate family" or "marriage" as constitutionally impermissible criteria for the distribution of public assistance. New Jersey's welfare program provided financial assistance to families consisting of a household composed of two adults who were married to each other and who had at least one minor child. New Jersey sought to exclude unmarried, cohabitating couples from benefits in order to strengthen the institutions of marriage and family and discourage non-marital child-bearing. The Supreme Court invalidated the New Jersey law. In the Court's view it denied equal protection of the law to those living together without marriage and to their children.

In *United States Department of Agriculture* v. *Moreno*,[38] a lower federal court invalidated a provision of the national food stamp program which required that for a "household" to be eligible for the national food assistance program it would have to be composed of individuals related by blood, marriage, or adoption. In striking down the law the lower court reasoned that "Recent Supreme Court decisions make it clear that even the states, which possess a general police power not granted to Congress, cannot in the name of morality infringe the rights to privacy and freedom of association in the home".[39] The Supreme Court upheld the lower court

36. 431 U.S. 453 (1977).
37. 411 U.S. 619 (1973).
38. 413 U.S. 528 (1973).
39. 345 F. Supp. 310, p. 314 (D.D.C. 1972).

decision saying that a restriction based on marriage was "wholly without any rational basis".[40]

The decisions in *Cahill* and *Moreno* are related to the series of cases which grant constitutional protection to the child born out of wedlock. Beginning in 1968 with *Levy* v. *Louisiana*[41] and *Glona* v. *American Guarantee and Liability Insurance Company*,[42] the Supreme Court moved to establish legally enforceable rights between the child born out of wedlock and his or her biological parents. In *Levy*, the Court held that these children have a right to a wrongful death action for the death of their mother. In *Glona*, the Court maintained that the mother had the reciprocal right of a wrongful death action for the death of her child even when born out of wedlock. Later, in *Gomez* v. *Perez*[43] the Court ruled that such children also had a right to child support from their biological father. With these cases the Court ended the view of the Anglo-American common law that the child born out of wedlock was the "child of no one".[44] Henceforth, members of such informal families could claim legal rights similar to those of persons related by marriage or adoption.

The Court then extended equal treatment for the child born out of wedlock beyond its biological relatives to the larger community and the provision of social services. In *Weber* v. *Aetna Casuality and Surety Company*[45] the Court ruled that workman's compensation benefits cannot be limited to legitimate children only. The Court's reasoning in this area is fairly represented by its opinion in *Weber*. There, the Court discussed the community's interest in promoting marriage and family as solely an interest in deterring immorality. The Court rejected what it characterized as the statute's objective: "persons will shun illicit relations because the offspring may not one day reap the benefits of workman's compensation".[46]

When the issue is put in such an absurd fashion few could disagree. But the real question is slightly broader: given the fact that such a relationship has resulted in a child being born, or about to be born, what are the parents going to do about it? Or further, what is the community going to suggest the parents do about it? The legal structure, reflected in part by the workman's compensation program invalidated in *Weber*, tilted the couple's decision toward marriage and the traditional family as the best way of providing for one's child. But following the result in *Weber* and its companion cases, it is difficult to see from a legal or economic viewpoint

40. *Supra*, note 38, p. 538.
41. 391 U.S. 68 (1968).
42. 391 U.S. 73 (1968).
43. 409 U.S. 535 (1973).
44. W. BLACKSTONE, *Commentaries on the Laws of England*, Lewis ed., 1898 p. 459.
45. 406 U.S. 164 (1972).
46. *Id.*, p. 173.

to what degree a couple can believe they are actually doing something *for* their child by marrying.

Indeed, the second justification offered by the Court in *Weber* is a more serious one, but it nonetheless raises similar concerns. It is as follows:

> imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual–as well as unjust–way of deterring the parent.[47]

Certainly, we should be far from the view of the common law that the child born out of wedlock is the child of no one and without rights in relation to its biological parents. When the Supreme Court moves in the direction of protecting inheritance rights for all children as it did in *Trimble* v. *Gordon*,[48] it is easy to agree with the result. However, the recognition of a legal responsibility arising from a biological relationship does not by necessity require the abandonment of legal distinctions between legitimacy and illegitimacy before the larger community. If ineligibility under a governmental food assistance program is an unjust legal burden, it is one very much different from that imposed by the legal status of nonpersonhood in regard to one's biological family. To equate the two, as the Supreme Court has done, is to suggest a profound change in the economic function of marriage and the family.

Professor Mary Ann Glendon's observations regarding the new family and the new property are of interest here. She writes of "the modern attenuated nuclear family with looser blood *and* conjugal ties, where jobs and entitlements of various sorts are the most important forms of wealth, and a person's status in the 'feudalism of the new property' is derived from his occupation or his dependency relation with government".[49] Professor Glendon is the first to admit that such a description may be "too stylized".[50] But the transition from reliance on marriage, family, and the status derived from belonging to a family based on marriage to the attenuated informal family largely dependent upon government is all too evident. All too evident as well is the dramatic upsurge in demand for governmental services and benefits at all levels as the family is gradually drained of legal, economic, and social functions.

47. *Id.*, p. 175.
48. 430 U.S. 762 (1977).
49. M. GLENDON, *op. cit.*, note 17, pp. 709-10; see also, G. BECKER, *A Treatise on the Family*, Cambridge, Harvard University Press, 1981.
50. M. GLENDON, *Id.*, p. 710.

IV. RECENT SUPREME COURT DECISIONS AFFECTING FAMILY LAW AND POLICY

Several recent Supreme Court decisions suggest that American family law may yet undergo another transformation or at least that the outer limits of the "revolution" of the last two decades have been clearly established. Three decisions affecting the "right of privacy" must be addressed in this context. The first case in this trio is *Bowers* v. *Hardwick*[51] in which an individual was charged with violating the State of Georgia's statute criminalizing sodomy by committing that act with another adult male in the bedroom of the individual's home. The individual challenged the Georgia statute, asserting that it violated his fundamental rights because his homosexual activity was protected by the right of privacy established in *Griswold* v. *Connecticut*, *Eisenstadt* v. *Baird*, and *Roe* v. *Wade*. However, the Supreme Court disagreed. It stated that "none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated[...].[52] The Court clearly refused to extend the right of privacy to protect homosexual acts between consenting adults. Perhaps equally as important was the Court's rejection of the contention that the determination by the State of Georgia that homosexual sodomy is immoral was not a sufficient, reasonable ground to support a criminal law. The Supreme Court stated, "the law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated[...] the courts will be very busy indeed".[53]

The second case in this trio is *Michael H.* v. *Gerald D.*[54] which involved a challenge to California's law that a child born to a married woman living with her husband is presumed to be a child of that marriage. Here, Michael H. challenged the California law and sought to establish his paternity of a child (Victoria D.) born to the wife (Carol D.) of another man (Gerald D.). The facts of the case are, as the Court noted, "extraordinary". Carol and Gerald were married and while residing as husband and wife together, Carol became involved in an adulterous affair with a neighbor, Michael. Shortly thereafter, she conceived and gave birth to a child, Victoria. Gerald, her husband, was listed as father on the birth certificate. However, shortly after the birth of Victoria, Carol informed Michael that she believed he might be the real father. Following the birth of Victoria,

51. 478 U.S. 186 (1986).
52. *Id.*, p. 191.
53. *Id.*, p. 196.
54. 109 S.Ct. 2333 (1989).

Carol alternately cohabited with Gerald and Michael; and, while residing with Michael, he and she undertook blood tests which showed a very high probability that Michael was indeed the father of Victoria. After cohabitating with Michael, Carol returned to Gerald and they resided again as husband and wife. Both Carol and Gerald rejected Michael's claim for paternity rights regarding Victoria.

After reviewing its decisions in a number of "privacy" cases, the Supreme Court concluded that although a biological father's rights were granted constitutional protection in certain cases "where, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the state to give categorical preference to the latter [...]".[55] The Court further reasoned that if there was a "freedom" on the side of the biological father there also was a "freedom" on the side of a marital father and that it was an

> erroneous view that there is only one side to this controversy-that one disposition can expand a 'liberty' of sorts without contradicting an equivalent 'liberty' on the other side. Such a happy choice is rarely available. Here, to provide protection to an adulterous natural father is to deny protection to a marital father, and *vice versa*. If Michael has a 'freedom not to conform' (whatever that means), Gerald must equivalently have a 'freedom to conform'. One of them will pay a price for asserting that 'freedom'-Michael by being unable to act as father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the traditional family unit he and Victoria have established. Our disposition does not choose between these two 'freedoms', but leaves that to the people of California.[56]

Thus, in the *Michael H.* case, the Court refused to continue the direction of *Eisenstadt*, *Danforth*, *East Cleveland*, *Cahill*, and *Moreno*, in further blurring the distinction between the rights of married and non-married persons.

The final case in this trio is *Webster* v. *Reproductive Health Services*.[57] In *Webster*, the Supreme Court considered a challenge to a new Missouri statute which among other things required that physicians conduct viability tests prior to performing abortions. In so doing, the statute challenged the trimester approach to regulation of abortion articulated in *Roe* v. *Wade*. The Supreme Court upheld the Missouri statute but refused to go further and invalidate its prior holding in *Roe* v. *Wade*. However, the Court made clear that it no longer found the trimester approach articulated in *Roe* to be entirely satisfactory and invited future state action to further restrict *Roe's* analytical framework.

In the context of a broad discussion of American family law, *Webster* is significant because it signals the possible demise or strict limiting

55. *Id.*, p. 2345.
56. *Ibid.*
57. 109 S.Ct. 3040 (1989).

of the right of privacy first articulated in *Griswold* and further established and expanded in *Roe* v. *Wade*. After *Webster*, the challenge confronting certain members of the Court is how to reverse *Roe* v. *Wade* while preserving a role for a right of privacy in reproductive decision-making. Should the right of privacy articulated in *Roe* fall, it may permit a rethinking of American marriage and family law unencumbered by the limits of privacy as understood to be autonomous zones of individual decision-making. Such a reconsideration may very well re-establish a larger role for community involvement in protecting and promoting the institution of the family based upon marriage.

CONCLUSION

The legal tendencies we have been discussing have profound consequences for family policy in the United States. First, "no-fault" divorce has radically changed the potential couple's expectations regarding marriage. A system of divorce at the will of either spouse does more than simply effect exit from marriage. It changes the social "rules" for entry into marriage. A system of "no-fault" divorce rewards the spouse's commitment to individuality and the individual's good rather than that of the common good of the marital couple. Because a commitment to the marital community is not protected by the "no-fault" legal environment, such a commitment is made solely at the spouse's own risk. Thus, the new legal framework actually promotes tendencies which enhance individuality and separation of the marital couple rather than tendencies which support unity and mutuality. Since the "no-fault" legal structure tells the marital couple to invest less in the marital community, it is not surprising that they increasingly expect less from it. With fewer and fewer legal, economic, and social returns from marriage, it is not surprising that more and more couples find less reason to maintain the marital commitment. This phenomenon is also promoted by the Supreme Court's jurisprudence on marriage reflected in decisions such as *Eisenstadt* and *Danforth* which essentially view marriage not as a unity or an institution, but essentially as a relationship between two separate and distinct individuals.

Clearly, these tendencies lead to a further one as well: the blurring of the distinction between the marital couple and the couple cohabitating outside of marriage. When that tendency is supported by principles of equality between marriage and non-marital cohabitation as occurred in *Eisenstadt*, *Cahill*, and *Moreno*, the law re-directs social policy in a direction far from support of the marital family. Government subsidy ultimately promotes the activity subsidized. It should come as no surprise that government services and benefits distributed no longer exclusively to the marital family but now provided equally between marital and non-marital families has paralleled the extraordinary rise of non-marital family units.

Similarly, the demand for such services increases rapidly as laws providing easy exit from marriage produce greater and greater numbers of families headed by formerly married mothers. The ability of government to substitute for the missing father or missing mother in the increasing number of such families is not unlimited. At some point harsh economic realities can be expected to force a reconsideration of this legal and public policy family environment.

In that review it will not suffice to simply speak as did Justice Douglas of the "sacred precincts of the marital bedroom" or to praise marriage as an institution which is "intimate to the degree of being sacred". To view sexual intimacy or one's expectation of privacy associated with it as the defining characteristic of marriage, is to misunderstand the precise point on which the unique position of marriage has been based within Western culture.

This tradition viewed matrimony as a natural institution with one of its principal ends being the good of the offspring. Thus, procreation concerned more than simply the decision to bear or beget a child but also a commitment to the education and development of the child. To reduce the procreative end of marriage to merely sexual activity as the Supreme Court has done is to fundamentally re-define the meaning of marriage. To have so casually effected this transformation in a case dealing with the use of contraceptives is one of the great ironies of contemporary jurisprudence. Having lost the connection between the unitive meaning and the procreative meaning of marriage in *Griswold*, the result reached in *Eisenstadt* of equating sexual activity within marriage with that occurring outside of marriage would seem to many as inevitable.

The unique position of marriage in Western culture arose not only as a result of a more complete understanding of procreation, but also as a consequence of the Judeo-Christian insight that the commitment of the spouses to one another was faithful and exclusive until death. This irrevocable (in canon law) and nearly irrevocable (in civil law) gift of one person to another within marriage distinguished it from all other relationships. Yet, it is this commitment of the spouses to treat each other as irreplaceable and nonsubstitutable that is precisely denied by cohabitation outside of marriage. Sexual activity outside of marriage by its very nature communicates to the other that he or she is replaceable and that a substitute may be found in the near future. Outside the marriage bond or within a bond that may be easily dissolved, sexual activity ceases to be the unique gift of one person to another person.[58]

The Western tradition, in holding that one of the principal ends of marriage included the good of the offspring, developed through time a

58. W. MAY, *Sex, Marriage, and Chastity*, Chicago, Franciscan Herald Press, 1981 pp. 77-79.

comprehensive legal structure around the institution of marriage to protect children. That structure was premised on the realization that there existed a profound connection among the begetting, nurturing, and educating of children. Now that this unity has been shattered, it remains to be seen whether the good of children may be maintained. The fact that millions of children in the United States now live in single-parent households and that such households account for nearly half the families living in poverty suggests that the outcome will not be promising.

Recent American jurisprudence as reflected by Supreme Court decisions during the past two decades suggests that the community should not concern itself with the prevention of moral harms, but may properly only deal with economic injuries. The lessons of the last decade make clear that in matters dealing with marriage and family life a dichotomy between moral and economic harm is a false one. Moral harms produce real consequences which often appear in economic terms. In its more recent decisions the Supreme Court appears to be more ready to accept a role for the community's interest in limiting moral as well as economic harms. If that trend continues a more solid foundation may be established for a truly family-centered legal and social policy.