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The Supreme Court's Impact on Marriage, 1967-90

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I. INTRODUCTION

In the twenty years following *Loving*,[1] the Supreme Court decided a number of cases dealing with the family. Although the Court reasoned that it was protecting marriage and extending such protection to other forms of families, the perverse effect of these decisions was to weaken the most traditional family type of all, the nuclear family. Adults, and particularly pregnant women and unwed fathers, triumphed in this move towards autonomy and rights.[2] The vanquished included those who depended upon the family for love and sustenance: minor children, elderly adults, and longtime homemakers.

This paper discusses these cases from a family law perspective. Because most of the litigants in these cases have been adults who needed to establish the existence of a constitutional right in order for their claims to even be heard by the Supreme Court,[3] the Court does not approach these cases from a family law perspective. The case that comes the closest to using family law language[4] *is not* one defining marriage or one seeking to establish some constitutional right. *Moore*

* Professor of Law, George Mason University School of Law. I must acknowledge the helpful suggestions of Frank Buckley, David Coolidge, and W. Sidney Moore. I owe tremendous intellectual debts to Katharine Bartlett, Mary Ann Glendon, Milton C. Regan, Carl Schneider, Elizabeth Scott and Lynn Wardle for their earlier work on this topic.

1. Loving v. Virginia, 388 U.S. 1 (1967).

2. Lynn Wardle warns against the extension of the "rights" movement to children. Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 LOY. U. CHI. L.J. 321 (1996).

3. *Cf. In re* Kirchner, 649 N.E.2d 324 (Ill. 1995), *cert. denied*, 515 U.S. 1152 (1995) *with In re* Clausen, 502 N.W.2d 649 (Mich. 1993), *stay denied*, DeBoer v. DeBoer, 509 U.S. 1301 (1993) (refusing to become involved in interstate custody disputes).

4. "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977).

is a defensive action by a grandmother trying to prevent the loss of a home and roots for her progeny.[5] It is a case that speaks of childrearing and persevering generations as the essence of family.[6]

This paper begins in Part II with the Supreme Court's view of marriage as seen in *Loving* and shows in Parts III to V how that view has been distorted as individual adults' and children's rights have been elevated above institutional concerns. In the more recent decisions discussed in Part VI, the Court seems to have come full circle, writing that marriage and family have independent values, again concentrating on the adults as opposed to their children or the broader society.

II. THE BEGINNING: *LOVING V. VIRGINIA* (1967)

In *Loving*[7] the Supreme Court discussed the necessity of marriage for the preservation of the individual, family life, and, indeed, society itself. The Court stated that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[8]

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5. *See id.* at 494. Mrs. Moore was asked to send away her grandson who had been living with her since his mother's death. When she refused, the city brought a criminal action against her for violating the "single family" zoning ordinance. In *Moore*, the Court admits that this is not the usual context for deciding cases dealing with family privacy, but reasons that "unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case." *Id.* at 501.

6. *Id.*

7. Loving v. Virginia, 388 U.S. 1 (1967).

8. *Id.* at 12 (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)). Family law about marriage and divorce is very much state law. *See* Ankenbrandt v. Richards, 504 U.S. 689 (1992) (allowing waiver of the "domestic relations exception" to federal diversity in children's suit against their father and his paramour for sexual and other abuse, but saying it still applied to divorce and custody matters); *see generally* Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1126 (1994). However, the *Loving* Court did not cite Virginia (or District of Columbia) sources for its description of marriage. Though sometimes the Court counts state laws (for example, those criminalizing abortion, Roe v. Wade, 410 U.S. 113, 134-140 (1973); or those forbidding sodomy, Bowers v. Hardwick, 478 U.S. 186, 191-94 (1986)), it seems discomfited by using state language about families, and cites, as here, to its own earlier opinions. Justice Douglas' opinion in Griswold v. Connecticut, 381 U.S. 479, 486 (1965), is perhaps the most famous:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

In *Loving*, the Court might have consulted the Virginia case of Alexander v. Kuykendall, 63 S.E. 2d. 746, 747 (Va. 1951), which notes:

These sentiments were echoed in the divorce case of *Boddie v. Connecticut*,[9] which guaranteed access to the courts to dissolve marriages:

> [G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.[10]

In the cases that followed, the Court focused on the "vital personal rights"[11] part of its analysis,[12] abandoning at least for the time being the institution's important role for educating children and building a better society.[13]

III. THE VITAL PERSONAL RIGHTS: CONTRACEPTION AND ABORTION

Some scholars maintain that the pivotal change in the Court's attitudes about marriage came with a case that wasn't about marriage at all.[14] *Eisenstadt v. Baird*[15] was one of a series of cases that tested and

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Marriage, as defined by Mr. Justice Story, in his Conflict of Laws, sec. 108, is "more than a mere contract. It is rather to be deemed an institution of society founded upon the consent and contract of the parties, and in this view it has more peculiarities in its natural character, operation, and extent of obligation different from what belongs to ordinary contracts. . . . Unlike other contracts, it is one instituted by God himself, and has its foundation in the law of nature. It is the parent, not the child, of civil society."

9. Boddie v. Connecticut, 401 U.S. 371 (1971).

10. *Id.* at 374.

11. *See Loving*, 388 U.S. at 1.

12. It need not have done so. Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts, Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989). She notes that "[f]eminists angrily reject the tradition of liberal theory that has felt so alien, so lacking in language and ability to comprehend our reality. . . . " *Id.* at 9. She notes that "[i]f we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but relationships—with parents, teachers, friends, loved ones—that provide the support and guidance necessary for the development and experience of autonomy. I think, therefore, that the most promising model, symbol, or metaphor for autonomy is not property, but childrearing." *Id.* at 12. Note the parallels to JOHN LOCKE, SECOND TREATISE ON GOVERNMENT, ch. VI, Of Paternal Power ¶ 67 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690); and HILLARY CLINTON, IT TAKES A VILLAGE (1996).

13. *See, e.g.*, AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA (1993) (talking about what happens when marriage is not the norm); Martha Minow, *"Forming Underneath Everything that Grows:" Toward a History of Family Law*, 1985 WIS. L. REV. 819, 893-94 (emphasizing how the autonomous self fails to protect values of interdependence). In place of transmitting other values, families may now merely transfer wealth to children in the form of financing their education. *See, e.g.*, John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 732-36 (1988).

14. *See, e.g.*, MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 39-40 (1993); Margaret G. Farrell, *Revisiting Roe v. Wade: Substance and Process in the Abortion De-*

eventually eradicated a series of New England statutes forbidding the distribution and use of contraceptives. The most important fact about this case, from a family law perspective at least, was that an unmarried woman, not a married couple,[16] had received the forbidden contraceptives. Just as in *Loving*, the Court's language is stirring and effective:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. 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 makeup. 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 whether to bear or beget a child.[17]

Eisenstadt looms important from a family law perspective because it separates the rights of the individual spouse from those belonging to the married couple. The privacy rights asserted here belong to the woman, whether married or single. For single women, *Eisenstadt* reduced the risk of unwanted pregnancies and laid the groundwork for the abortion cases that would shortly follow.[18] Meanwhile, the responsibility for contraception shifted from the man (who could purchase condoms even in those states with restrictive contraceptive regimes) to the woman (who could use birth control pills, diaphragms, or foam) to prevent pregnancy.[19]

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bate, 68 IND. L.J. 269, 302 (1993); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 12 & n.55 (1995) (citing Lawrence Tribe and Mary Ann Glendon); Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 514 (1992); Robin West, *Integrity and Universality: A Comment on Ronald Dworkin's Freedom's Law*, 65 FORDHAM L. REV. 1313, 1324 (1997).

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

16. The landmark contraception case was *Griswold v. Connecticut*, 381 U.S. 479 (1965).

17. *Eisenstadt*, 405 U.S. at 453 (emphasis in original).

18. *See, e.g.*, West, *supra* note 14.

19. *See, e.g.*, June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359, 423 & n.253 (1994); Linda C. McLain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339, 423 (1996). The woman apparently has the legal responsibility for birth control in the U.S.S.R. and the People's Republic of China. *See* Mark Savage, *The Law of Abortion in the Union of Soviet Socialist Republics and the People's Republic of China: Women's Rights in Two Socialist Countries*, 40 STAN. L. REV. 1027, 1102 & n.393 (1988). For a reflection on what this shift has meant for premarital bargaining between men and women, see George A. Akerlof et al., *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q. J. ECON. 277 (1996).

The abortion cases further distinguished sexual intercourse from not only childbearing but also marriage. In *Roe v. Wade*,[20] the Court held that the right to privacy encompassed the woman's right to terminate her pregnancy.[21] In addition, the Court held in *Planned Parenthood of Central Missouri v. Danforth*[22] that a married woman's husband did not have the right to veto her decision to obtain an abortion.[23]

The Court's reasoning, echoed in the recent case of *Casey v. Planned Parenthood of S.E. Pennsylvania*,[24] was that, in those marriages where the woman would not voluntarily consult her husband, he might threaten or actually inflict violence or other retribution upon her.[25] In particular, *Casey* discussed the balance of power within the marital relationship.[26] The Court concluded that married women's equality with their husbands might well be lost were her unilateral right to obtain an abortion curtailed.[27]

Minors also gained reproductive freedom. Traditional parental control over children was upset by the Court's privacy decisions in the late 1970s. *Carey v. Population Servs. Int'l*,[28] paralleling *Griswold*,[29] began the trend by announcing that minors, like adult unmarried people, have independent rights to privacy involving matters of sexuality.[30] Although the Court still presumed that parents still act in their children's best interests,[31] many states have extended the privacy rights of minors to include rights to obtain treatment for venereal dis-

20. Roe v. Wade, 410 U.S. 113 (1973). As the Court noted later in *Carey v. Population Services International*, 431 U.S. 678 (1978), after *Eisenstadt* and *Roe v. Wade*, "*Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." *Id.* at 687.

21. *Roe*, 410 U.S. at 152-53.

22. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

23. *Id.* at 69. The Court noted that where husband and wife disagreed about her abortion, only one of the husband-wife pair could prevail. Because she physically carried and delivered the child, the wife had the greater interest in the decision.

24. Casey v. Planned Parenthood of S.E. Pa., 505 U.S. 833 (1992).

25. *Id.* at 887-901.

26. *See id.*

27. *Id.* Concerns with equality over solidarity mark much of Mary Ann Glendon's *The Transformation of Family Law: State, Law and Family in the United States and Western Europe* 102-143 (1989). She notes that the equality principle has drained marriage of much of its legal significance. *Id.* at 95.

28. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

29. Griswold v. Connecticut, 381 U.S. 479 (1965).

30. *See generally Carey*, 431 U.S. at 678.

31. *See* Parham v. J.R., 442 U.S. 584 (1979).

eases or mental health problems.[32] While containing dicta about the importance of the family, the Court allowed the pregnant minor to terminate her pregnancy without her parent's consent.[33] Although a state may constitutionally require that she notify a parent or obtain judicial consent,[34] *Belotti* removes this important decision from the domain of the family.

IV. THE CONSEQUENCES OF CHILDREN'S RIGHTS FOR MARRIAGE

How society views children affects how we view marriage. In Roman times,[35] children were seen as an extension of the head of the household, the *pater familias*.[36] As they matured, sons would represent him as citizens, soldiers, farmers, or tradesmen. The daughters could secure him social standing through their marriage alliances or could care for him during old age.[37]

In Catholic doctrine, children are the expression of their parents' love.[38] They anchor or bind parents together, acting as hostages or bonds.[39] Professor Anthony Padovano, writing from this tradition,

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32. *See, e.g.*, VA. CODE ANN. § 54.1-2969D (Michie 1994).

33. *See* Belotti v. Baird, 443 U.S. 622 (1979).

34. *Id.*

35. *See* PHILLIPE ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE (Robert Baldick trans., Knopf 1962) (1960); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983). *See generally* JAMES A. BRUNDAGE, LAW, SEX AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 33-34 (1987).

36. Children are seen as "a gift from the Lord" in *Psalm* 127:3-5 (New American Standard 1973).

> Behold, children are a gift of the Lord;
> The fruit of the womb is a reward.
> Like arrows in the hand of the warrior,
> So are the children of one's youth.
> How blessed is the man whose quiver is full of them;
> they shall not be ashamed,
> When they speak with their enemies in the gate.

37. The family, children included, continued to be central throughout early American history. *See, e.g.*, STEPHEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 1 (1988); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 36 (1985).

38. *See, e.g.*, POPE JOHN PAUL II, *Familiaris Consortio* [On the Family] No. 21 (1981). Marriage is a communion of two giving rise to a community of persons greater than the two; POPE JOHN PAUL II, *Letter to Families*, No. 7, 8 (1994), just as marriage is a mutual gift of self between husbands and wives, *id.* No. 11; Teresa Stanton Collett, *Marriage, Family and the Positive Law*, 10 NOTRE DAME. J. L. ETHICS & PUB. POL'Y 467, 476 (1996).

39. *See* JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 37-47 (rev. ed. 1984); Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519 (1983); Anthony Kronman, *Contracts and the State of Nature*, 1 J. L. ECON. & ORG. 5 (1985); Margaret F. Brinig & F.H. Buckley, *Joint Custody:*

notes that "[m]arriage unites the human family more profoundly than any religion. The world is one with the wedding couple. Children, born from this union, move us with love more universally than any other reality. A family is the world's logo, icon, image of harmony, peace, and affection."[40]

When the family farm (or estate) declined in importance, children, however, ceased to have the same social or economic function. Consequently, childhood became an "age of man" of its own.[41] Today, children in the Western world are viewed as economic sinkholes and consumption items.[42]

Just as marriage performs an important function for children,[43] children assist their parents' marriage. For several centuries after ab-

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Bonding and Monitoring Theories, 73 IND. L.J. (forthcoming 1998). I must acknowledge that Frank Buckley had this thought before I did, as frequently happens. Although the idea appeared in various drafts of our paper, I must admit that I was focusing on the bonding the fathers were doing with their children, not with their wives.

40. Anthony T. Padovano, *Marriage: The Most Noble of Human Achievements*, 238 CATH. WORLD 140 (1995). Padovano notes that in the Genesis account of creation, male and female are created together, and are not asked to pray or obey the Law, but to regenerate the image and likeness of God through marriage and sexual love.

41. *See* ARIES, *supra* note 35; JOHN DEMOS, *Images of the American Family, Then and Now*, *in* CHANGING IMAGES OF THE FAMILY 43 (Virginia Tufte and Barbara Myerhoff eds., Yale U. Press 1979); JEAN-LOUIS FLANDRIN, FAMILIES IN FORMER TIMES: KINSHIP, HOUSEHOLD AND SEXUALITY 154-56 (Rochard Southern trans. 1979) (1976); GROSSBERG, *supra* note 37, at 5; VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN (1985); John Demos, *The American Family in Past Time*, 43 AM. SCHOLAR 422 (1974).

42. *See* Margaret F. Brinig, *The Family Franchise: Elderly Parents and Adult Siblings*, 1996 UTAH L. REV. 393 [hereinafter *The Family Franchise*]. Children will eventually serve to extend the family line biologically, but also through its history and reputation. In some instances, children may support their parents in old age. This occurs more frequently, of course, in countries like Japan and Korea. *See, e.g.*, Margaret F. Brinig, *Limited Horizons: The American Family*, 2 INT'L J. CHILDREN'S RTS. (1994); *Savings and Demographics: Some International Comparisons*, 6 FAM. ECON. REV. 22 (1993).

43. A host of evidence suggests that children do best in two parent, married families. *See* James H. Humphrey, *Some General Causes of Stress in Children*, *in* STRESS IN CHILDHOOD 3, 6-8 (James Humphrey ed., 1984) (suggesting that children benefit from role models of the same and opposite gender). *See, e.g.*, sources cited in Margaret F. Brinig, *The Marriage Covenant*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT (F.H. Buckley ed., forthcoming 1998); DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY (1996); David Blankenhorn, *The State of the Family and the Family Policy Debate*, 36 SANTA CLARA L. REV. 431 (1996); William Galston, *Causes of Declining Well-Being Among U.S. Children*, ASPEN INST. Q., Winter, 1993 at 52. Parents may act as complements or balance each other. *See* Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317 (1994).

For some rather horrifying recent statistics on child abuse, see ROBERT WHELAN, BROKEN HOMES AND BATTERED CHILDREN (1993), showing that British children were 33 times more likely to be abused and 73 times more likely to be killed if living in the home with their mother and a cohabitant than in an intact family. *See generally* Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N. C. L. REV. 1117 (1997) (abuse by stepparents).

solute divorce became possible, it was, except in the most grave circumstances, unthinkable when there were children. Parents ought to stay together "for the sake of the children."[44] In fact, the proponents of the Louisiana Covenant Marriage,[45] as well as others suggesting returns to fault divorce, promote such measures because divorce harms children.[46] Because these sentiments linger, it is unsurprising that the divorce rate is lower where there are more children under eighteen.[47]

But do children act "like little anchors"[48] because we feel guilty about harming them[49] or because they change the fundamental nature of marriage? When people become parents, children depend upon them, and they must learn to give unconditionally and to think of others first.[50] Regardless of the various conceptions about marriage and its duration, children will be a part of their parents forever.[51]

These ideas relate to the Supreme Court privacy cases because they suggest that, at least in adolescence and for some purposes, chil-

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44. *See* Linda J. Lacey, *Mandatory Marriage "For The Sake of The Children": A Feminist Reply To Elizabeth Scott*, 66 TUL. L. REV. 1435 (1992). *See, e.g.*, Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553 (1984); Elizabeth Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 31 (1990); Judith T. Younger, *Responsible Parents and Good Children*, 14 LAW. & INEQ. J. 489 (1996).

45. *See* LA. CIV. CODE ANN. art. 102 (West 1993 & Supp. 1998).

46. *See* Maggie Gallagher, *Marriage Covenants; Louisiana Finds Balm for Divorce Epidemic*, DALLAS MORNING NEWS, July 24, 1997, at 27A. Va. House Bill 2624, would amend VA. CODE ANN. § 20-91(9) by adding a subsection (d), which would provide that the no-fault separation provision:

> shall not apply if (i) there are minor children born of the parties, born of either party and adopted by the other, or adopted by both parties, and (ii) either party files a written objection to the granting of a divorce pursuant to this subdivision. Any such written objection shall be filed within twenty-one days of service of the initial pleading requesting a divorce under this section in the court in which such initial pleading was filed.

See also VICTOR FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 104-10 (1988).

47. *See* Margaret F. Brinig & F.H. Buckley, *No-Fault Laws and At Fault People*, INT'L REV. OF L. & ECON. (1998 forthcoming); Gary S. Becker, et al., *An Economic Analysis of Marital Instability*, 85 J. POL. ECON. 1141 (1977).

48. This phrase is attributable to my aunt, Jean Friedlander.

49. This is one of the suggestions in Brinig & Buckley, *Joint Custody*, *supra* note 39. *Cf.* Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 J. POL. ECON. 385 (1993) (role of guilt in assuring respect of and support for aged parents).

50. Virginia Held, *Mothering versus Contract*, *in* BEYOND SELF-INTEREST 287, 287-304 (Jane Mansbridge ed., 1990); Nedelsky, *supra* note 12, at 7 (1989); Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181-215 (1995); *see also* JUDITH WALLERSTEIN & SANDRA BLAKESLEE, THE GOOD MARRIAGE: HOW AND WHY LOVE LASTS (1995) (finding that people in happy marriages used the pronoun "we" more often than most couples, looking at crises as a joint challenge).

51. *See generally* MARGARET F. BRINIG, THE CONTRACT AND THE COVENANT (forthcoming); Brinig, *The Family Franchise*, *supra* note 42.

dren and their parents function independently rather than as a unit.[52] The more children have independent rights "of privacy, religion,[53] or freedom from search"[54] the less the family serves as a moral and social unit.[55] Providing children with independent rights is another reason for the disappearance of deep and stable marriage. If parents do not have to guide and protect their children (or if they do not have any children at all), they can choose to think about themselves.[56]

From another perspective, one can consider the family to have a flow of communication, intimacy and love among its members.[57]

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52. MARY ANN GLENDON, NEW FAMILY AND THE NEW PROPERTY 37 (1981).

53. Wisconsin v. Yoder, 406 U.S. 205, 242 (1972) (Douglas, J., concurring and dissenting); Comment, *Adjudicating What Yoder Left Unresolved: Religious Rights for Minor Children After Danforth and Carey*, 126 U. PA. L. REV. 1135 (1978).

54. *See, e.g., In re* Scott K, 595 P.2d 105 (Cal. 1979); State v. Douglas, 498 A.2d 364 (N.J. Super. Ct. App. Div. 1985). *See generally* Bruce Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. REV. 605.

55. *See* Ferdinand Schoeman, *Rights of Children, Rights of Parents, and the Moral Basis of the Family*, 91 ETHICS 8-9 (1980):

> We typically pay attention to the rights of individuals in order to stress their moral independence. . . . The danger of talk about rights of children is that it may encourage people to think that the proper relationship between themselves and their children is the abstract one that the language of rights is forged to suit.

See also MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 109 (1991) (rights talk disserves public deliberation not only through affirmatively promoting an image of the rights-bearer as a radically autonomous individual, but through its corresponding neglect of the social dimensions of human personhood); Hafen, *supra* note 54; Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1835-70 (1985); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995); Wardle, *supra* note 2, at 342-43; Barbara B. Woodhouse, *Children's Rights: The Destruction and Promise of Family*, 1993 B.Y.U. L. REV. 497. *But see* John Holt, *Why Not a Bill of Rights for Children?, in* ESCAPE FROM CHILDHOOD, *reprinted in* THE CHILDREN'S RIGHTS MOVEMENT: OVERCOMING THE OPPRESSION OF YOUNG PEOPLE 319 (Beatrice Gross & Ronald Gross eds., 1977); Wendy Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspective & the Law*, 36 ARIZ. L. REV. 11 (1994); Henry H. Foster, Jr. & Doris Jonas Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972); Richard Farson, *Birthrights—A Children's Bill of Rights*, Ms. MAGAZINE, Mar. 1974, at 66.

56. Meanwhile, children apparently have more and more time to complain about the jobs we are doing as parents. *See e.g.,* Kingsley v. Kingsley, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993); Burnette v. Wahl, 588 P.2d 1105 (Ore. 1978). Dean W. Sidney Moore made this connection for me.

Unlike American or German law, Glendon notes that in France, a spouse can sue for waste and mismanagement during the marriage and can seek a court order to protect the community from a reckless or unfair spouse and to insure that some marital property remains to divide if the partnership founders. GLENDON, *supra* note 27, at 121-22.

57. *See generally* MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY (1993). This is of course a natural law concept as well. *See* GLENDON, *supra* note 55; Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 970-71 (1987). Shaffer writes:

> An alternative argument is that the family created the promises, the contract, the consent, and the circumstantial harmony—not the other way around. . . . In these ordinary ways of accounting to ourselves for ourselves, it is the family that causes individuals to make the promises that begin, develop, and continue families.

When one channel of this flow stops, the relationships among its members change. This is also one way in which the abortion decisions, regardless of the Constitutional or political necessity[58] for them, have changed marriage.

The change can also be seen in law and economics terms. One measure of the change is in the shrinking degree of specialization between spouses that exists in most marriages,[59] even those with children. Because more married women are working in the paid labor force, more "household production" comes from outside the relationship as these women contract with others for the services they used to perform.[60] Another change is the perception that Kaldor-Hicks optimality, rather than Pareto, is sufficient: the parents need only consider an improvement in their own well-being, disregarding possible negative externalities inflicted upon their children. Therefore, marriage produces less wealth for women in particular in terms of health and material goods.[61] In addition, women, who are arguably inclined to identify more strongly with their children than are men, feel less happy.[62]

V. THE ELEVATION OF SINGLE PARENTHOOD

A number of Supreme Court cases decided since *Loving* were designed to decrease the gulf between children whose parents were married and those whose parents were not.[63] Other cases moved toward greater equality between unwed mothers and fathers.[64] In emphasizing the importance of family functions instead of their legal forms, marriage has become less significant for the couple contemplating it and society as a whole.[65] Its decline has led to more cohabiting

58. *See* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992); *see also* Brief for the National Abortion Rights League, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (Nos. 84-495 and 84-1379).

59. *See generally* GARY S. BECKER, A TREATISE ON THE FAMILY 30-42 (2d ed. 1991); Margaret F. Brinig, *Comment on Jana Singer's* Alimony and Efficiency, 82 GEO. L.J. 2461 (1994).

60. *See* Margaret F. Brinig, *The Law and Economics of No-Fault Divorce*, 26 FAM. L.Q. 453, 456-57 & nn.20-22 (1993) (reviewing ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? (1992)); JUNE R. CARBONE, FROM PARTNERS TO PARENTS (forthcoming 1998).

61. *See* Linda J. Waite, *Does Marriage Matter?*, 32 DEMOGRAPHY 483 (1995); *see also* BRINIG, *supra* note 51, at 2471-73.

62. *See* Waite, *supra* note 61.

63. *See* Levy v Louisiana, 391 U.S. 68 (1968); Weber v. Aetna Cas. Co., 406 U.S. 164 (1972).

64. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972).

65. The "palimony" cases are now legion. They begin, of course, with Marvin v. Marvin, 557 P.2d 106 (Cal. 1976). *See generally* Larry L. Bumpass et al., *The Role of Cohabitation in Declining Rates of Marriage*, 53 J. MARR. & FAM. 913 (1991); Herma Hill Kay & Carol Amyx, *Marvin v. Marvin: Preserving the Options*, 65 CAL. L. REV. 937 (1977). Some of these problems

relationships. Without marriage, however, societal problems increase, if only because cohabiting relationships are so much less stable.[66]

The first case in this group that collapsed the difference between marital and non-marital parenting is *Levy v. Louisiana*,[67] decided only a year after *Loving*. *Levy* struck down the Louisiana wrongful death statute that gave only legitimate children the right to sue a tortfeasor. The Court found that it was wrong to look at the parent's marital status to define the relationship between a mother and her children: "These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would."[68] In 1972, any distinction between unwed mothers and fathers in wrongful death proceedings was invalidated in *Weber v. Aetna Casualty and Surety Co.*[69] Again, the Court stressed the parental function being performed rather than the parent's marital status.[70]

The "functional family" approach was stretched to its limit in *Moore v. City of East Cleveland*.[71] The Court struck down a housing ordinance that defined "single family dwelling" to exclude a grandmother and her grandsons because they were not her biological chil-

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are exacerbated by the lack of any direct payment for housework in marriage. *See, e.g.*, Nancy C. Staudt, *Taxing Housework*, 84 GEO. L. J. 1571 (1996); Katherine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 N.W. U. L. REV. 1 (1996). *See generally* Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640 (1991).

66. *See, e.g.*, Sally Cuningham Clarke and Barbara Foley Wilson, *The Relative Stability of Remarriages: A Cohort Approach Using Vital Statistics*, 43 FAM. REL. 305 (1994).

67. Levy v. Louisiana, 391 U.S. 68 (1968).

68. *Id.* at 72.

69. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

70. [T]he dependency and natural affinity of the unacknowledged illegitimate children for their father were as great as those of the four legitimate children whom Louisiana law has allowed to recover. The legitimate children and the illegitimate children all lived in the home of the deceased and were equally dependent upon him for maintenance and support.

Id. at 169-70. The functional family approach arguably reached its zenith in *Butcher v. Superior Court of Orange County*, 188 Cal. Rptr. 503, 511 (1983), where an unmarried cohabitant was permitted to sue for loss of consortium. The court noted that "[t]he relationship of unmarried cohabitants possesses every characteristic of the spousal relationship except formalization." Another functional family case is *Braschi v. Stahl Associates Co.*, 543 N.E.2d 49 (N.Y. 1989), where the survivor of a gay couple was allowed as a family member to inherit the deceased's rent controlled apartment. "The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but should find its foundation on the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence." *Id.* at 53-54.

71. Moore v. City of East Cleveland, 431 U.S. 494 (1977).

dren.[72] After citing a number of cases establishing parental rights, the Court reasoned that "unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case."[73] The Court went on to note: "By the same token the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."[74]

While the plaintiffs in question in cases like *Levy*, *Weber,* and *Moore* were clearly sympathetic, the single fathers in a number of other cases heard by the Court during this period had neither married their children's mothers nor otherwise legitimated their children. Nonetheless, single fathers were entitled to at least a hearing[75] and the opportunity to become custodial parents.[76] Natural parents' rights,

72. The Census Bureau reports a dramatic increase in the number of households headed by grandparents who are raising children alone from under 950,000 in 1990 to nearly 1,500,000 in 1995. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P20-484, MARITAL STATUS AND LIVING ARRANGEMENTS (1994).

73. *Moore*, 431 U.S. at 501.

74. *Id.* at 506. For another discussion of *Moore*, see Frederick E. Dashiell, Note, *The Right of Family Life: Moore v. City of East Cleveland*, 6 BLACK L.J. 288, 295 (1980) (concluding that the *Moore* decision is especially important to black family life because of the economic and social plight of black citizens).

75. Stanley v. Illinois, 405 U.S. 645 (1972), quoted from several of the bedrock parents' rights cases, saying:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and "rights far more precious . . . than property rights," May v. Anderson, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). *Id.* at 651.

Moore should be distinguished from another "functions" case, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2-3, 7 (1974) (upholding another "single family" zoning ordinance that prevented most groups of unrelated persons, such as college roommates, from living together because they lacked a fundamental right to live together).

76. Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979) (because unwed mothers had an opportunity to block their children's adoption, so did unwed fathers). The only significant break upon the growing rights given to unwed fathers appears in *Quilloin v. Walcott*, 434 U.S. 246 (1978), in which the father who had previously enjoyed no significant contact with his children tried to block their adoption by the mother's new husband. Unlike *Stanley*, this was "not a case in which the unwed father at any time had, or sought, actual or legal custody of his child." Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the "best interests of the child." *Id.* at 255.

even though the children had been temporarily removed on grounds of their unfitness, were stronger than those given under foster parents contracts.[77] Fathers, like mothers, enjoyed significant rights in their children that would not easily be abrogated even through misconduct.[78] Another example of paternal rights is that an out-of-state father is entitled to more than actual notice before a mother could collect child support from him.[79]

VI. COMING FULL CIRCLE: *MICHAEL H. V. GERALD D.*

The trend toward approval of single parenthood finally halted. The Court began to approve of marriage rather than other less traditional family forms. However, it did so as the result of the actions of adults rather than upon a consideration of the best interests of the children involved.[80] The first of these cases is *Zablocki v. Redhail*,[81] in which the Court held that a father could not be denied the right to marry because he had not assured the Court that he had met the child

77. *Smith v. Organization of Foster Families*, 431 U.S. 816, 844-45 (1977), held that foster parents were not entitled to a pre-removal hearing before the children in their care were returned to the birth parents or moved to another set of foster parents. Justice Brennan wrote for the Court: "[W]here a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child . . . as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals." On the other hand, foster parents "do contract to return a child on request and any recognition of a constitutional protection for the foster family relation would create 'virtually unavoidable . . . tension' with the rights of the biologic family." *See generally* David Chambers & Michael Wald, Smith v. Offer: *A Case Study of Children in Foster Care*, *in* IN THE INTEREST OF CHILDREN (Robert H. Mnookin ed., 1985).

78. *See Foster Families*, 431 U.S. at 816, 844-45.

79. Kulko v. Superior Court of California, 436 U.S. 84 (1978). The court noted:

> In seeking to justify the burden that would be imposed on appellant were the exercise of *in personam* jurisdiction in California sustained, appellee argues that California has substantial interests in protecting the welfare of its minor residents and in promoting to the fullest extent possible a healthy and supportive family environment in which the children of the State are to be raised. These interests are unquestionably important. But while the presence of the children and one parent in California arguably might favor application of California law in a lawsuit in New York, the fact that California may be the "center of gravity" for choice-of-law purposes does not mean that California has personal jurisdiction over the defendant.

Id. at 98.

80. For discussions of the case in family law terms, *see* Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992); Elizabeth S. Scott, *Pluralism, Parental Preference and Child Custody*, 80 CAL. L. REV. 615 (1992); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1992).

81. Zablocki v. Redhail, 434 U.S. 374 (1978). *Redhail* has been criticized because, since it was couched in constitutional terms, the Court sent "the symbolic message that free men and women possess not only the power but the 'right' to assume new commitments in derogation of existing ones." Barbara B. Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245, 277 (1990).

support obligations from another relationship.[82] He had this right because, as the Court had already found in *Carey v. Population Services International*:[83]

> While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage,[84] procreation,[85] contraception,[86] family relationships,[87] and child rearing and education.[88]

The *Redhail* Court also noted the line of cases establishing access to the court system, especially in disputes regarding marriage.[89]

The second case, *Bowers v. Hardwick*,[90] is a decision many find hard to explain after the seemingly inexorable advance of adult privacy rights.[91] In *Bowers*, the Court again connects family, marriage, and childrearing:

> No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in *Carey* twice asserted that the privacy

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82. *Redhail*, 434 U.S. at 390.

83. Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977).

84. *Id.* (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).

85. *Id.* (citing Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942)).

86. *Id.* (citing Eisenstadt v. Baird, 405 U.S., at 453-54; *id.*, at 460, 463-65 (White, J., concurring in result)).

87. *Id.* (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

88. *Id.* (citing Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

89. *Id.* at 385 & n.10. According to the Court:

> Further support for the fundamental importance of marriage is found in our decisions dealing with rights of access to courts in civil cases. In *Boddie v. Connecticut*, 401 U.S. 371 (1971), we wrote that "marriage involves interests of basic importance in our society" *id.* at 376, and held that filing fees for divorce actions violated the due process rights of indigents unable to pay the fees.

90. Bowers v. Hardwick, 478 U.S. 186 (1986). *Bowers* upheld Georgia's criminalizing adult consensual homosexual sodomy.

91. Given a close reading of cases like *Roe v. Wade*, which rely on the history of state sanctions against abortion, the only real explanation for upholding Georgia's ban in view of the diminishing legislative prohibitions of sodomy seems to be moral repugnance against same-sex sexual conduct. *See, e.g.*, Abby R. Rubenfeld, *Lessons Learned: A Reflection upon* Bowers v. Hardwick, 11 NOVA L. REV. 59 (1986); Ali Khan, *The Invasion of Sexual Privacy*, 23 SAN DIEGO L. REV. 957 (1986); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

> right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far.[92]

But procreation and even conjugal life are not necessarily part of marriage. The third case, *Turner v. Safley*,[93] affirmed inmates' rights to marry without securing permission from prison authorities. The Court stressed the affection and adult rights that are secured by wedlock:

> Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life. First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a pre-condition to the receipt of government benefits (e. g., Social Security benefits), property rights (e. g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e. g., legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.[94]

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92. *Bowers*, 478 U.S. at 191.

93. Turner v. Safley, 482 U.S. 78 (1987). *See generally* Cahn, *supra* note 8, at 1126; June Carbone, *Morality, Public Policy and the Family: The Role of Marriage and the Public/Private Divide*, 36 SANTA CLARA L. REV. 267, 286 (1996); David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 119 (1997); Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black And Scalia*, 74 B.U. L. REV. 25, 66 (1992); Steven K. Homer, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505, 530 (1994); Katheryn D. Katz, *Majoritarian Morality and Parental Rights*, 88 ALB. L. REV. 405, 469 (1988); Earl M. Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949 (1992); Robert G. Spector, *The Nationalization of Family Law: An Introduction to the Manual for the Coming Age*, 27 FAM. L.Q. 1, 5 (1993); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1558-60 (1997); Barbara Bennett Woodhouse, *Hatching The Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1865 (1993); Woodhouse, *supra* note 81, at 273-75 (1990); Judith T. Younger, *Marriage, Divorce, and the Family: A Cautionary Tale*, 21 HOFSTRA L. REV. 1367 (1993); Arthur S. Leonard, *Going For The Brass Ring: The Case For Same-Sex Marriage*, 82 CORNELL L. REV. 572, 593 (1997) (reviewing WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996)).

94. *Safley*, 482 U.S. at 95-96. Though the Court's personnel had not changed after *Bowers'* rejection of the legality of same-sex conduct, so that a recognition of same-sex marriage was not likely, obviously the reasons put forward by the *Turner* plaintiffs are very close to the reasons

Michael H. is the fourth case decided in the 1967-1990 period in which the Court looked back almost wistfully at traditional marriage, giving at least lip service to the most familiar family form.[95] In this case, the Court rejects the plea of a biological father for a relationship with the daughter conceived in an adulterous relationship.[96] It is yet another case involving a child where all the majority's concern seems to be for the adult rights involved.[97] The Court does distinguish the *Stanley* line of cases by noting that they "rest . . . upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."[98] Although the Court rewarded the attempts of the wronged husband to hold together his marriage and family, it could well have reached the same result by acknowledging the effect of these choices on the child, Victoria. For her, despite the allegations of her mother, who sought to maintain her own liberty interest by excluding Michael from his daughter's life,[99] the family law question was whether Victoria must grow up torn between the pulls of two fathers or in the traditional two-parent family. Again, the Court neglects the way that children diminish adult autonomy in marriage.

VII. CONCLUSION

After more than twenty years of Court pronouncements on the family, the legal analysis of family issues is still a bit confused. The

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gay and lesbian couples seek to marry as opposed to gaining relief through cohabitation contracts or domestic partnership registration.

95. Michael H. v. Gerald D., 491 U.S. 110 (1989).

96. *Id.*

97. For some commentary on the case, see Linda R. Crane, *Family Values and the Supreme Court*, 25 CONN. L. REV. 427 (1993); Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1993); Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1569-71 (1994); Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967 (1994); Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 396 (1996); Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 404-05, 411 (1994); Lynn Kirsch, Note, *Unwed Fathers and Their Newborn Children Placed for Adoption: Protecting the Rights of Both in Custody Disputes*, 36 ARIZ. L. REV. 1011, 1031-33 (1994); Mary Kay Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of Michael H. v. Gerald D.*, 65 TUL. L. REV. 585, 587, 595 (1991); Linda C. McClain, *Rights And Irresponsibility*, 43 DUKE L.J. 989, 1088 (1994); Schneider, *supra* note 14; Barbara B. Woodhouse, *supra* note 55, at 505-06, 515 (1993); Judith T. Younger, *Responsible Parents and Good Children*, 14 LAW & INEQ. J. 489-93 (1994).

98. *See* Michael H. v. Gerald D., 491 U.S. 110, 123 (1989).

99. *Michael H.*, 491 U.S. at 110.

cases are not written in the "language of love"[100] or even in family law language speaking to the "best interests of the child,"[101] but in the harsher language of rights.[102] These decisions vindicate the choices and inclinations of adults, reflecting an America that increasingly views marriage as an emotional and impermanent relationship.[103] The permanence, commitment, and unconditional nurturing of marriage[104] and parenthood are mostly ignored.

100. *See* Robert F. Drinan, *Sovereignty and Human Rights*, 20 CANADA-U.S. L.J. 75, 86 (1994); Reva B. Siegel, *The Modernization of Marital Status Law: Adjusting Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2211 (1994).

101. *See, e.g.*, JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973).

102. *See, e.g.*, GLENDON, *supra* note 27, at 295-306; *see also* Woodhouse, *supra* note 81, at 2.

103. *See, e.g.*, MAGGIE GALLAGHER, THE ABOLITION OF MARRIAGE (1996); Barbara Dafoe Whitehead, *Can Marriage Be Rescued?*, COMMONWEAL, May 17, 1996, at 18 (reviewing RICHARD WEISSBOURD, THE VULNERABLE CHILD (1996) & MAGGIE GALLAGHER, THE ABOLITION OF MARRIAGE (1996)); Frank Furstenberg, *The Future of Marriage*, AM. DEMOGRAPHICS, June 1996, at 34 (noting that marriage is too often something that only the relatively wealthy can afford because of lack of social supports for the institution).

104. In the traditional marriage service, the husband promised to comfort his wife. The Oxford English Dictionary defines comfort as strengthening; encouraging, inciting; aiding, succouring, and supporting. OXFORD ENGLISH DICTIONARY (2d ed. 1989). The same definitions include the wife of one's bosom from *Deut.* 13:6 (New American Standard 1973).