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The Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Social Interests

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THE CONSTITUTIONAL STATUS OF MARRIAGE, KINSHIP, AND SEXUAL PRIVACY — BALANCING THE INDIVIDUAL AND SOCIAL INTERESTS

*Bruce C. Hafen**

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INTRODUCTION

In a recent editorial, the San Francisco *Examiner* observed that, "The notion that an unmarried relationship is the equivalent of marriage is an attack upon social norms, the destruction of which concerns a great many people in the nation and, we assume, in San Francisco."¹ Shortly thereafter, San Francisco's Board of Supervisors approved an unprecedented ordinance authorizing the payment of spousal benefits to unmarried partners who share "the common necessities of life" with city employees.² At the Baltimore session of the 1980 White House Conference on the Family, one delegate asked the conference to define the family as "two or more persons who share resources, responsibility for decisions, values and goals, and have commitment to one another over time." This proposal lost by only two votes among 761 delegates.³ As these incidents suggest, in today's national dialogue on American family life, we are having increasing difficulty even agreeing about what a "family" is.

The way family relationships are defined has significant legal consequences because our laws bestow great benefits upon families. Consider, for example, marital interests in real property; privileged communications between husband and wife; inheritance rights belonging to family survivors under intestate succession laws; and wrongful death rights in tort law. The Supreme Court has also established several categories of extraordinary constitutional protection for marriage, child-parent relationships, and related interests.⁴ These benefits arise from the law's recognition that family relationships are extremely important to individuals. In addition, the law reflects strong social and even political interests in sustaining formal family ties.⁵

The relationships historically protected by American law are limited to those that arise from kinship, adoption, or heterosexual mar-

1. San Francisco Examiner, Nov. 21, 1982, at B10, col. 1.

2. *And Now, Gay Family Rights?*, TIME, Dec. 13, 1982, at 74. Mayor Diane Feinstein vetoed the ordinance. San Francisco Chron., Dec. 10, 1982, at 1, col. 4.

3. *All in the Family*, TIME, June 16, 1980, at 31.

4. See Part II *infra*.

5. These interests are discussed in Part I *infra*.

riage.⁶ Thus, unmarried couples are not regarded as families for the many purposes addressed by state and federal laws.⁷ American legal institutions — particularly the judiciary — have begun over the last several years to recognize a few exceptions that would once have been denied by a very rigid legal and social policy of reinforcing formal family relationships.⁸ Generally, however, the law remains quite certain about what a family is for the most fundamental purposes.

There is nonetheless a growing sense of uncertainty about the place of the formal family in our hierarchy of national values. Some of this ambiguity has been generated by reading an unwarranted amount of individualistic sentiment into recent social science research⁹ and legal literature¹⁰ during a period of some cultural tur-

6. No state today would knowingly issue a marriage license to a homosexual couple. See Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 874-78 (1979). See generally Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973) (discussing the constitutionality of restricting licenses to heterosexual couples). Isolated reports do exist that some homosexuals have nevertheless married formally. Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 677 (1976).

7. Even the celebrated *Marvin* case was based on the theory of an implied contract. Application of California's community property laws and Family Law Act was explicitly rejected in the case. *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1977). The California Court of Appeal subsequently reversed the rehabilitative award to Michelle Marvin because it was neither consensual in nature nor supported by any recognized obligation in law. *Marvin v. Marvin*, 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (1981).

8. See Part III C *infra*.

9. Between 1960 and 1978, the divorce ratio increased 157 percent. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, No. 338, MARITAL STATUS AND LIVING ARRANGEMENTS 3 (1979). The number of unmarried couples increased an estimated 157.4 percent between 1970 and 1980, with the actual number increasing from 523,000 to 1,346,000. U.S. Dept. of Commerce, *summarized in The American Family Bent — but Not Broken*, U.S. NEWS & WORLD REP., June 16, 1980, at 48, 50. The illegitimacy ratio tripled in the two decades prior to 1975, Carlson, *Families, Sex, and the Liberal Agenda*, 58 PUB. INT. 62, 66 (1980), so that by 1977, 15.5% of all children — and 51.7% of all black children — born in the United States were illegitimate. See *Parham v. Hughes*, 441 U.S. 347, 367 n.14 (1979) (White, J., dissenting). Such statistics have drawn expressions of alarm from some family sociologists. See, e.g., Bronfenbrenner, *The Calamitous Decline of the American Family*, Wash. Post., Jan. 2, 1977, at C1, col. 1 (Outlook).

There have also been changes in sexual attitudes and practices. Some regard the changes as a "sexual revolution." See Carlson, *supra*. The degree of perceived change in cohabitation norms was cited in the *Marvin* case:

The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many. Lest we be misunderstood, however, we take this occasion to point out that the structure of society itself largely depends upon the institution of marriage

Marvin v. Marvin, 18 Cal. 3d 660, 684, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1977).

Curiously, there seems to be little empirical basis for recent changes in attitudes toward traditional values. "No new theories or research findings have provoked the current questioning of family life"; rather, "the social upheavals of the past decade" have led to skepticism concerning all kinds of American institutions, traditions, and authority patterns. A. SKOLNICK, *THE INTIMATE ENVIRONMENT Preface* at i (1973). Some sociologists link increases in

moil. The emerging uneasiness seems to arise not in spite of the

sexual freedom to the women's movement, in part because recent changes in attitude and behavior appear to be far greater among women than among men. See, e.g., L. SCANZONI & J. SCANZONI, *MEN, WOMEN AND CHANGE* 85-89 (2d ed. 1981). Whatever the causes, the developments of recent years have persuaded some family life scholars that, "The nuclear family is crumbling — to be replaced, I think, by the free floating couple . . ." E. SHORTER, *THE MAKING OF THE MODERN FAMILY* 280 (1975); see also J. BERNARD, *THE FUTURE OF MARRIAGE* 269-89 (1972).

On the other hand, there is a growing body of social science research showing that many family commitments are stronger than ever. While recent divorce rates have been unquestionably high, other statistics indicate that remarriage rates have risen equally high, with a greater proportion of Americans marrying than ever before. See M. BANE, *HERE TO STAY* 34-36 (1976). The proportion of children living with at least one parent, rather than living in foster or institutional care, has also increased. *Id.* at 12. The social significance of the increase in unmarried cohabitation may be reduced by noting that the percentage of all couples who are married dropped only from 98.8% to 97.2% between 1970 and 1980. This calculation is based on U.S. Dept. of Commerce data summarized in *The American Family Bent — but Not Broken*, U.S. NEWS & WORLD REP., June 16, 1980, at 48, 50. Thus, "[t]he number of persons engaged in pursuing 'alternative life-styles,' although much larger than it used to be, is too small proportionately to be accurately recorded in a national census or in a community survey . . ." T. CAPLOW, H. BAHR, B. CHADWICK, R. HILL, & M. WILLIAMSON, *MIDDLETOWN FAMILIES: FIFTY YEARS OF CHANGE AND CONTINUITY* 335 (1982) [hereinafter cited as *MIDDLETOWN FAMILIES*].

Sociologist Joseph Featherstone has summarized available studies which suggest that even the changes in structure, function, and roles being accommodated by the contemporary family deal with such phenomena as working mothers, families where fathers raise the children, and couples choosing to remain childless, Featherstone, *Family Matters*, 49 HARV. EDUC. REV. 20, 23 (1979), not with free-floating unmarried couples or communal marriages. The social scientists updating the classic longitudinal study of American family life in the representative city of Middletown found that the gap between current rhetoric and empirical data demonstrates the continuing survival of "the myth of the declining family," which took root in the 1930s and "has flourished mightily ever since and now seems nearly as indestructible as the American family itself." *MIDDLETOWN FAMILIES*, *supra*, at 328. Much of the current strain on family life that does exist is due primarily to "poverty and inequality," Featherstone, *supra*, at 38, suggesting that a national policy debate concerning the relationship of economic programs to family stability is likely to continue. Compare, e.g., K. KENISTON, *ALL OUR CHILDREN* (1977), with Lasch, *Review of All Our Children*, NEW YORK REVIEW OF BOOKS, Nov. 24, 1977, at 15-18, and Carlson, *supra*.

As for the sexual revolution, recent empirical data indicate that pornography and information about sexuality are far more widely distributed today than in earlier generations. The incidence of premarital sex (especially among females) has also increased. However, *extramarital* sex does not seem to have increased significantly. For a brief summary of recent research in the context of comparisons with the 1920s, see *MIDDLETOWN FAMILIES*, *supra*, at 161-94. Even the premarital sex that occurs "is brief, infrequent, and limited to one partner (or a few) whom [adolescents] hope to marry." *Id.* at 168. Indeed, given such "powerful [contemporary] inducements . . . to avoid marriage" as welfare programs that provide a "bounty for children born out of wedlock" and "the promotion of adolescent sexuality" by governmentally sponsored programs on sex education and contraception, "the persistence of marriage . . . in the United States . . . is as impressive as the large increase in the number of unmarried adults during the past decade." *Id.* at 334-35. In seeking to reconcile "the public's current interest in the subject of extramarital sex with its continuing disapproval of it," sex researcher Morton Hunt concluded that the contemporary climate has resulted in more "open discussion" and "an unconcealed appetite for vicarious experience. At the same time most people continue to disapprove of such behavior because they believe that when it becomes a reality rather than a fantasy, it undermines and endangers the most important human relationship in their lives." M. HUNT, *SEXUAL BEHAVIOR IN THE 1970s*, at 256 (1974). Thus, the Middletown researchers concluded, "[S]urely the mass media have exaggerated the scope of the changes [in sexual norms]. Monogamic heterosexual marriage is still the nearly universal norm, and most nonmarital sexual behavior involves the possibility of eventual marriage." *MIDDLETOWN*

family's legally protected status, but, in part, because of that status. In this time of fully flowered egalitarianism, the very existence of a legal preference increases the number who want to qualify for it. Thus, some legal scholars and a few lower court cases assume that the constitutional principles are now in place to remove the significant legal distinctions between married and unmarried persons, along with establishing a right of sexual privacy for consenting unmarried adults.

For example, Kenneth Karst has argued that there should be a constitutional right that would give any "intimate association" between two persons the same protection as the law now gives to relationships based on marriage and kinship.¹¹ Also, the New York Court of Appeals recently extended the constitutional right of privacy to protect the right of unmarried adults to seek "sexual gratification."¹² While sexual privacy may at first seem unrelated to the issue of family forms, this case was a key factor in the subsequent decision of a lower New York court to allow one adult male to adopt another.¹³ On a variation of the privacy theory, the Pennsylvania Supreme Court has given constitutional protection to sex acts per-

FAMILIES, *supra*, at 168. Anthropologist David Schneider concurs: "[S]exual intercourse is legitimate and proper only between husband and wife and each has the exclusive right to the sexual activity of the other. These are the tenets of American culture." D. SCHNEIDER, AMERICAN KINSHIP: A CULTURAL ACCOUNT 38 (2d ed. 1980) (footnote omitted).

10. For summaries of the relevant literature, see Grey, *Eros, Civilization, and the Burger Court*, LAW & CONTEMP. PROBS., Summer 1980, at 83; *Developments in the Law — the Constitution and the Family*, 93 HARV. L. REV. 1156 (1980) [hereinafter cited as *Developments*]. Grey's piece includes an appendix summarizing all of the law review literature between 1965 and 1979 that addressed the relationship between constitutional privacy and legal prohibitions of consensual adult sex. Comparing this literature with a review of the Supreme Court's work, Grey concludes that nearly all the commentators have consistently "read . . . the libertarian tradition into the privacy cases with almost no encouragement from the Court." Grey, *supra*, at 98.

While some commentators have possibly been influenced to interpret the Court in this way by their own preferences for the resulting outcomes, others have read excessive breadth into the cases as a way of stressing their disagreement with the results. To infer from the cases that marriage is now merely "some sort of relationship between two individuals," Clark, *The New Marriage*, 12 WILLAMETTE L.J. 441, 450 (1976), or that "Equal Protection" now "requires the equal treatment of the married and the unmarried in all respects," Noonan, *The Family and the Supreme Court*, 23 CATH. U. L. REV. 255, 273 (1973), is such an overreaction. See Part II *infra*. Unfortunately, overreactions can become self-fulfilling prophecies, as the courts may be influenced as much by commentary on important cases as they are by the cases themselves, especially given the ambiguity the Court has created with its use of due process substitutes and individual rights terminology. See note 15 *infra*.

11. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

12. *People v. Onofre*, 51 N.Y.2d 476, 488, 415 N.E.2d 936, 940, 434 N.Y.S.2d 947, 951 (1980), *cert. denied*, 451 U.S. 987 (1981).

13. *In re Adoption of Adult Anonymous*, 106 Misc. 2d 792, 435 N.Y.S.2d 527 (1981). *Contra, In re Adoption of Adult Anonymous II*, 111 Misc. 2d 320, 443 N.Y.S.2d 1008 (1981) (family court in different New York county from *Adult Anonymous I* disallows adoption between adult males because no child-parent relationship would be created).

formed in a public lounge between dancing performers and lounge patrons.¹⁴ Litigants in such cases, aided by the confusing language of some Supreme Court decisions,¹⁵ see privacy as an individual right which is independent of the relationships it may protect.

The use of individual rights analysis, as typically understood, can be inappropriate and even harmful in the context of family relationships. For example, contemporary legal writers take for granted that the "right to marry" is grounded "in respect for freedom of choice in intimate personal relationships,"¹⁶ since "choice of domestic companionship constitutes the kind of intimate personal decision"¹⁷ that is at the heart of the Court's evolving privacy doctrines.¹⁸ Thus, the right to marry cases are seen by these writers as part of a constitutional doctrine based essentially on individual autonomy. With that premise firmly in place, any legal restraint on freely entering or leaving marital relationships is suspect in their eyes. With the scales between individual and social interests thereby tipped heavily toward the individual side, few, if any, attempts at state regulation would

14. *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980) (statute prohibiting deviate sex acts between unmarried persons has no rational basis and violates equal protection by discriminating against the unmarried).

15. In its family privacy cases, the Court has often used individualistic civil rights theories and rhetoric in stating a rationale for its conclusions, even though a close reading of the cases reveals an instinctive awareness of the negative impact of full blown individual rights theories on family relationships. The Court has also sent out mixed signals because of its unfortunate determination to rationalize important decisions under a bewildering array of individualistic disguises for substantive due process.

Griswold v. Connecticut, 381 U.S. 479 (1965), established the right of married couples to use contraceptives without threat of criminal prosecution. The challenged statute was, as Justice Stewart conceded in dissent, "an uncommonly silly law," 381 U.S. at 527 (Stewart, J., dissenting): so silly, in fact, that a majority of the Court could not help reaching the conclusion that the law was unconstitutional, even though the absence of clear textual support forced the Court to search for a rationale in six different amendments, as well as the metaphysically tantalizing "penumbras" emanating from explicit guarantees in the Bill of Rights. A few years later, Justice Stewart, concurring in *Roe v. Wade*, 410 U.S. 113 (1973), shed some light on the predicament the Court had faced in *Griswold*. He explained that the Justices had explicitly rejected substantive due process in an 8-1 decision only two years before *Griswold*. 410 U.S. at 167 (Stewart, J., concurring); see *Ferguson v. Skrupa*, 372 U.S. 726 (1963). Therefore, he said, the *Griswold* Court "understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision." 410 U.S. at 168 (Stewart, J., concurring).

The Court has continued to do its best to avoid the development of a consistent and understandable test for its family-related cases. As a result, the cases are loaded with references in dicta to such limitless possibilities as "zones of privacy," "individual autonomy," and "freedom of personal choice." In 1977, Justice Powell bravely declared that substantive due process based on traditional values had indeed been the basis for virtually all of the Court's family privacy decisions, but by then the conceptual turf had been so muddied that this flash of candor was not very enlightening. *Moore v. City of E. Cleveland*, 431 U.S. 494, 501 (1977).

16. See, e.g., *Developments, supra* note 10, at 1311.

17. *Wilkinson & White, Constitutional Protection for Personal Lifestyles*, 62 *CORNELL L. REV.* 563, 569 (1977).

18. *But see* Part II F *infra*.

withstand scrutiny.¹⁹

The fundamental error in this method of analysis was identified many years ago in a valuable article²⁰ by Roscoe Pound: "It is important to distinguish the *individual* interests in domestic relations from the *social* interest in the family and marriage as social institutions."²¹ He defined "social interest" as:

[O]n the one hand a social interest in the maintenance of the family as a social institution and on the other hand a social interest in the protection of dependent persons, in securing to all individuals a moral and social life and in the rearing and training of sound and well-bred citizens for the future.²²

For Pound, it was elementary that individual and social interests must be compared "on the same plane," lest the very decision to categorize one claim as "individual" and the other as "social" cause us to "decide the question in advance in our very way of putting it."²³ Moreover, from Pound's viewpoint:

When the legal system recognizes certain individual rights, it does so because it has been decided that society as a whole will benefit by satisfying the individual claims in question; for example, when the legal system guarantees the individual freedom of speech, it advances society's interest in facilitating social, political, and cultural progress. This interest . . . is more important than society's interest in preserving existing institutions.²⁴

In recent years, however, individual interests, carried on a tidal wave of constitutional law, have taken on such overpowering significance that it is difficult for the contemporary mind to see any interests other than individual ones. Thus it has been observed that while the Court's early marriage cases "turned on the importance of marriage to society," its more recent cases "turn on the importance of the relationship to the individual."²⁵

19. For instance, the Supreme Court of Puerto Rico held that the constitutional right of privacy requires the allowance of divorce by mutual consent without a waiting period. *Ferrer v. Commonwealth*, 4 FAM. L. REP. (BNA) 2744 (1978). Even those sympathetic to facilitating divorce have argued elsewhere that counseling requirements and mandatory separation periods are justified in the interest of preventing "hasty decisions about divorce" if states are to prevent marriages from being "trivially or inconsequentially undone." *Developments, supra* note 10, at 1312 (quoting *Wilkinson & White, supra* note 17, at 576).

20. Henry Foster called it "perhaps the best known essay in the history of family law." Foster, *Relational Interests of the Family*, 1962 U. ILL. L.F. 493, 493.

21. Pound, *Individual Interests in Domestic Relations*, 14 MICH. L. REV. 177, 177 (1916) (emphasis added).

22. *Id.* at 182.

23. Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943).

24. Auerbach, *Comment*, in *IS LAW DEAD?* 208 (E. Rostow ed. 1971) (replying to Dworin, *Taking Rights Seriously*, in *IS LAW DEAD?* 168 (E. Rostow ed. 1971)).

25. *Developments, supra* note 10, at 1248-49.

Ideas about individual rights derive from the original theory of the Constitution, which deals with the relationship between the individual and the State. Domestic relations, however, have traditionally been matters of state law, not federal constitutional law,²⁶ in part because the regulation of those relationships is not simply a matter of the State vs. the individual. For instance, many people besides a dissatisfied spouse are affected by the dissolution of a marriage.²⁷ The most obvious examples are the other spouse, any children of the marriage, and the kinship network affected by the marriage. Moreover, regulation of marital status has always been a fundamental element in helping human society induce the behavior needed for *social* as well as individual survival.²⁸ In addition, the law's ultimate goal in supporting family ties is the *sustaining* of ongoing relationships, not merely the crude determining of who is right and who is wrong, who wins and who loses.²⁹

All this is not to say that the individual interest in marriage is less significant than the social interest. It is only to say that the individual and the social interests are so intertwined in family cases that meaningful analysis of the competing interests is rendered impossi-

26. [D]omestic relations is an area that has long been regarded as a virtually exclusive province of the States. . . . In *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878), the Court said: "The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. . . ."

Sosna v. Iowa, 419 U.S. 393, 404 (1975).

27. A decree of divorce is not a matter in which the only interested parties are the State as a sort of "grantor," and a divorce petitioner . . . in the role of "grantee." Both spouses are obviously interested in the proceedings, since it will affect their marital status and very likely their property rights. Where a married couple has minor children, a decree of divorce would usually include provisions for their custody and support.

Sosna v. Iowa, 419 U.S. 393, 406-07 (1975).

28. The marital commitment has meant, as a cultural construct of our society, that love and family transcend mere legal obligations. That commitment thus becomes, paradoxically, an "uncoercive way to transform individuals . . . into voluntary participants in the nurture of society. . . . The family is effective because it is steeped in the blood, sexuality, flesh, and flow of our unconscious lives, where true changes in character and commitment can take root." G. GILDER, *SEXUAL SUICIDE* 73 (1973). To achieve this result, "Society has had to invest marriage with all the ceremonial sanctity of religion and law. This did not happen as a way to promote intimacy and companionship. It happened to ensure civilized society." *Id.* at 73-74.

29. Robert Burt has observed that "direct, prolonged conflict" may at times characterize intra-family relationships, yet "the contemporary Court's general jurisprudence" fails "to appreciate the importance of such conflict in forging communal bonds." Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 394-95. His criticism is directed at "[b]oth the liberal and conservative blocs on the Court" because of their failure "to see their proper institutional role in leading fundamentally alienated combatants toward the pursuit of mutual accommodation." *Id.* at 387. Only a "sense of mutual allegiance" can "legitimate bonds of authority and community" amid the social alienation of modern society. *Id.* at 395. The marital commitment is one of the most fruitful sources of that kind of mutual allegiance, not only because of its power to deal with conflict over time, but because of its larger effect on society's necessary and legitimate "bonds of authority and community." *Id.*

ble by current civil liberties approaches that always give the individual interest a procedurally exalted priority over the social interest. Great need exists for a method of constitutional analysis that will allow for explicit consideration of the social interest in domestic relations.

Today's lopsided competition between the individual and social interests has made the law a party to the contemporary haze that clouds our vision of what a family is or should be. In that sense, recent legal developments have contributed to the crisis Stanley Hauerwas has identified regarding American family life today — our inability to define "what kind of family should exist" and our inability to articulate "why we should think of [the family] as our most basic moral institution."³⁰

In response to those two questions, this Article considers whether, as a *constitutional* matter, the courts should recognize claims by unrelated individuals or groups who seek the same legal protection as that given to formal relationships based on legal marriage or kinship. Part I sets forth some of the significant functions performed by formal families. The social and political policies that encourage the performance of these functions help explain why the formal family continues to merit constitutional protection not afforded informal relationships. They also illuminate why we have historically thought of the family as our most fundamental moral and social institution. I will argue that the failure to distinguish between a formal family and an informal relationship overlooks and finally undermines the family's ability to perform these functions.

Part II summarizes the Supreme Court's relevant decisions in this area. This summary will show that marriage and kinship are still the touchstones of constitutional adjudication in family-related cases, including those dealing with sexual privacy. The Court has limited some traditional policies, but has done so only in an effort to remedy exceptional inequities. Even the exceptional cases have been treated in such a way that constitutional protection has not been extended to relationships between unmarried adults. These decisions are thus consistent with the policies that originally gave rise to the protection of interests in marriage, childrearing, and kinship.

Part III will suggest a method of constitutional analysis that explains why these cases reached appropriate results. This analytical framework will enable the weighing of individual and social interest "on the same plane," lest the analytical approach to an apparent

30. Hauerwas, *The Moral Meaning of the Family*, 107 COMMONWEAL 432, 432 (1980).

constitutional problem cause us to "decide the question in advance in our very way of putting it."³¹ This model will also clarify the analysis used in determining which legal *interests* should be included within the constitutionally protected categories that require strict judicial scrutiny. An inquiry of this kind helps to determine the theory on which interests arising from marriage and kinship are entitled to extraordinary constitutional protection while other interests that appear to have some functional similarity are excluded. One of the most serious errors made by some lower court judges attempting to apply a constitutional right of privacy has been to *assume*, as a first analytical step, that any "private" conduct is part of due process liberty. These courts have then focused "on what they viewed as the state's lack of interest in preventing private . . . behavior, rather than on the nature of the activity involved."³² Whether an affirmative right is at stake, however, depends, in the first instance, on "the nature of the activity involved."³³

I. MARRIAGE, KINSHIP, AND THE PURPOSES OF A DEMOCRATIC SOCIETY

Perhaps because family life is so much a part of the unspecifiable bedrock of society, there has been a puzzling inattention in both legal and other literature to the broad social policies underlying the preference historically given by the law to family relationships. This contrasts remarkably with the voluminous scholarly work on individual rights. Domestic patterns universally accepted before the dawn of law and government have hardly seemed to require full-dress justification. Thus, the case law and other commentary on our traditional assumptions seldom go beyond platitudes and clichés. The objectives of a democratic society based on established patterns of marriage and kinship should not be terribly mysterious; serious scholars, however, have seldom felt a need to document them. For instance, a stable environment is crucial to the developmental needs of children. Yet contemporary literature advocating (or, for that matter, condemning) open marriages and informal cohabitation rarely treats this issue. The unarticulated policy roots of family law are also related to the political ends of democracy, because it is primarily through family bonds that both children and parents learn the attitudes and skills that sustain an open society. A brief exami-

31. Pound, *supra* note 23, at 2.

32. Note, *On Privacy: Constitutional Protections for Personal Liberty*, 48 N.Y.U. L. Rev. 670, 724 (1973).

33. *Id.*

nation of such issues suggests that the cultural patterns of American family life have contributed enormously to the ultimate purposes of a democratic society by providing the stability and the structure that are essential to sustaining individual liberty over the long term.

A. *The Needs of Children*

In their "Bill of Rights for Children," Henry Foster and Doris Freed stated that: "A child has a moral right and should have a legal right . . . [t]o receive parental love and affection, discipline and guidance, and to grow to maturity in a home environment which enables him to develop into a mature and responsible adult."³⁴ This declaration was not a new idea. It was at the foundation of the juvenile court movement since the turn of the century. Earlier, Jeremy Bentham wrote that "[t]he feebleness of infancy demands a continual protection," because "[t]he complete development of its physical powers takes many years; that of its intellectual faculties is still slower."³⁵ John Locke believed that parents owed an obligation to "Nature" to "nourish and educate" their children until their "understanding be fit to take the government of [their] will."³⁶ In this way, the young were to be prepared to enter the individual tradition as mature and rational beings. Thus, said Locke, "we see how natural freedom and subjection to parents may consist together, and are both founded on the same principle."³⁷

This most basic of children's "rights" — the right to be prepared by parents for the responsibilities of adult life — has remained essentially a moral, rather than a legal, duty of parents, primarily because the law is powerless to enforce such broad affirmative obligations. Despite the natural limits on what parents can be "made" to do, the conditions that optimize "a home environment which enables [a child] to develop into a mature and responsible adult"³⁸ are clearly encouraged by cultural patterns and reinforced by legal expectations that create a sense of permanency and stable expectations in child-parent relations. By giving priority to permanent, relational interests within families, the Supreme Court has reinforced the law's insistence on the conditions that maximize stability.

Empirical studies establish beyond question "the need of every

34. Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 347 (1972).

35. 1 J. BENTHAM, *THEORY OF LEGISLATION* 248 (Boston 1840).

36. J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* §§ 56, 59 (1690).

37. *Id.* § 61.

38. Foster & Freed, *supra* note 34, at 347.

child for unbroken continuity of affectionate and stimulating relationships with an adult."³⁹ More broadly, "[c]ontinuity of relationships, surroundings, and environmental influence are essential for a child's normal development."⁴⁰ The child's need for these forms of stability is so great that disruptions of the child-parent relationship by the state, even when there appears to be inadequate parental care, frequently do more harm than good.⁴¹ Recent data from a variety of fields and sources confirm "[i]n study after study" how "vital the family is in the crucial areas of individual motivation, personality structure, and creativeness."⁴²

Findings such as these have begun to raise substantial doubts about the value of the dominant governmental service strategies of the past twenty years, whose planners have assumed that many family functions could be better performed by outside agencies. The 1977 report of the Carnegie Council on Children, for example, rejected the proposition that education could ensure equal economic opportunities and argued generally that public policies related to children should give higher priority to the qualitative influence of parents and home life.⁴³ The integrated totality of family functions in a natural family appears somehow to be greater than the sum of the individual functions. American society, for all its recent experiments, today seems further from finding real substitutes for the performance of the family role than it was in the pre-Great Society days. The social experiments of other countries seem no more fruitful.⁴⁴

39. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTEREST OF THE CHILD* 6 (2d ed. 1979).

40. *Id.* at 31-32.

41. See generally Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 *STAN. L. REV.* 985 (1975).

42. R. NISBET, *TWILIGHT OF AUTHORITY* 84 (1975).

43. See generally K. KENISTON, *supra* note 9.

44. Legislation in Sweden has attempted to be "as far as possible . . . neutral in its relationship to various forms of cohabitation and different moral ideas," though the law has tried to ensure that "marriage has . . . a centered place in family law . . ." To this point, however, it is still not clear "[w]hether the Swedish attempt to free sexual unions from the bonds of governmental regulation and to treat them purely as affairs of free individual love will be . . . successful." M. RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* 156-57 (1972).

Russia has retreated considerably from its earlier attempts to implement the Marxist demand that existing family forms be changed because they perpetuated capitalistic property ideas. For Engels and Marx, marriage and legitimacy were counterproductive; children were to be brought into collectives rather than parental homes. In 1926, the conclusion and termination of Russian marriages were made purely private transactions. By 1944, however, new state regulation of marriage, divorce, and illegitimacy was introduced, partly through considerations of population policy, but also because:

The strengthening of the family . . . had become necessary because of the communist state's interest in the welfare of the nation's offspring as well as its fear that the national

Yet recent sociological theories have emphasized (as they did in the 1920's) "marriage to the exclusion of the family. . . . Child rearing once again presents itself as no more than a by-product of marriage."⁴⁵ This emphasis reflects the general influence of atomistic individualism that ranks personal interaction between marital partners higher than "socialization, child training, or transmission of culture"⁴⁶ Such a tendency views "children's rights" in similar terms, stressing children's own individualistic right to "control their own lives."

This point of view contradicts that fundamental children's right — "[t]o receive parental love and affection, discipline and guidance"⁴⁷ in a way that educates the young toward maturity. Homer Clark has observed that "much of the discussion of the desirability of contemporary nonmarital unions ignores the interests of the children of such unions," who are, among other things, "handicapped in seeking support."⁴⁸ To "abandon children to their rights"⁴⁹ not only ignores the real needs of children, but also creates within adults a false expectation that they, too, can be — or should be — "liberated" from the arduous demands of a parental and community commitment to childrearing. The Supreme Court has given high priority to the *right* of parents to direct the upbringing of their children, but that very liberty has received constitutional protection in no small part because it also reflects the social *responsibility* of the parents. "[T]hose who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."⁵⁰

Not all formal families are stable, nor do all necessarily provide wholesome continuity for their children, as the prevailing levels of child abuse and divorce amply demonstrate. But the commitments inherent in formal families do increase the likelihood of stability and continuity for children. Those factors are so essential to child devel-

strength and vigor might be sapped by the laxity of morals, sexual and otherwise. The public institutions for child care had been developed vigorously. To a considerable extent they freed women for work outside the home, but they were far from totally replacing the home as classical Marxist theory had expected them rapidly to do.

Id. at 231.

45. C. LASCH, *HAVEN IN A HEARTLESS WORLD* 142 (1977).

46. *Id.* at 150.

47. Foster & Freed, *supra* note 34, at 347.

48. Clark, *The New Marriage*, *supra* note 10, at 451.

49. The phrase is Albert Solnit's. It is discussed within the context of the children's rights movement in Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. REV. 605, 651.

50. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

opment that they alone may justify the legal incentives and preferences traditionally given to permanent kinship units based on marriage. The same factors can justify the denial of legal protection to unstable social patterns that threaten children's developmental environment.

B. *Socialization and Public Virtue: Obedience to the Unenforceable*

In the historical movement of society from Status to Contract,⁵¹ “[t]he individual is steadily substituted for the Family, as the unit of which civil laws take account.”⁵² The individualism of Contract assumes that each person acts primarily in his own interest. Under Status, however, it was assumed that people would act for the good of the order in which they held membership and from which they derived their status. The commitments of close kinship and marriage represent the last modern vestiges of Status as a source of duty. Much of what family members — especially marital partners — “owe” one another cannot be enforced in a court of law;⁵³ yet the sense of family duty has an uncanny power to produce obedience to the unenforceable in ways that defy Adam Smith's assumption that self-interest is man's dominant value. In this way, the family tradition is a prerequisite to a successful individual tradition. Through the commitments of marriage and kinship both children and parents experience the need for and the value of authority, responsibility, and duty in their most pristine forms.

A sense of voluntary duty is the lifeblood of a free society, for “only with a public-spirited, self-sacrificing people could the authority of a popularly elected ruler be obeyed, but more by the virtue of the people than by the terror of his power.”⁵⁴ Those who formulated our constitutional system understood the importance of “public virtue,” but they knew it could not be coerced by the State without

51. See text at notes 504-05, *infra*.

52. H. MAINE, *ANCIENT LAW* 163 (1st Am. ed. 1870).

53. When a marriage is threatened with collapse, for example, the law directly assists only the person who wishes to dissolve the marriage. A spouse who wishes to continue it can find little comfort in the law, not only because divorce lawyers usually have little interest in marital continuity, but because the law is generally powerless to enforce affirmative obligations. Therefore, society upholds the sanctity of the marital commitment primarily as a matter of cultural norms, supported by a legal, albeit unenforceable, obligation. Such expressions of societal norms serve primarily to encourage couples to take their marital obligations seriously and to comply voluntarily with society's expectations.

54. Horwitz, *John Locke and the Preservation of Liberty: A Perennial Problem of Civic Education*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 131 (R. Horwitz ed. 1979) (quoting G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 68 (1969)).

doing violence to the inalienable individual rights on which the system was premised.⁵⁵ At a more profound level, John Locke understood that no civic virtue could exist unless it had been individually *learned* and voluntarily assumed. Thus, Locke's educational philosophy would not suppress natural passions and instincts in teaching a child: "What is wanted is not suppression, but *redirection*: 'For where there is no Desire, there will be no Industry.'"⁵⁶

Because this essential social — even political — ingredient could not be a coercive State function, American society has "relied to a considerable extent on the family not only to nurture the young but also to instill the habits required by citizenship in a self-governing community. We have relied on the family to teach us to care for others, [and] to moderate . . . self-interest . . ." ⁵⁷ This connection between home and society has made it clear since the early days of the Republic that it was more important to keep pure the headwaters of humanity than simply to worry about downstream pollution.⁵⁸ With this perspective, the family in a democratic society not only provides emotional companionship, but is also a principal source of moral and civic duty. Citizenship, after all, is also more a matter of Status than Contract.

Something about the combined permanence, authority, and love that characterize the formal family uniquely makes possible the performance of this teaching enterprise:

[T]he best argument for the indispensability of the family [is] that children grow up best under . . . conditions of "intense emotional involvement" [with their parents]. . . . Without struggling with the ambivalent emotions aroused by the union of love and discipline in his parents, the child never masters his inner rage or his fear of authority. It is for this reason that children need parents, not professional nurses and counselors.⁵⁹

Christopher Lasch noted that this process, whereby the child brings his self-oriented impulses into some kind of harmony with loving, yet inevitably demanding, parental authority was the focus of

55. See generally Horwitz, *supra* note 54.

56. *Id.* at 148 (emphasis in original) (quoting J. LOCKE, SOME THOUGHTS CONCERNING EDUCATION § 126 (London 1705)).

57. W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 222 (1976).

58. This metaphor is Neal A. Maxwell's.

59. C. LASCH, *supra* note 45, at 123. Consider also the observation of Berger and Neuhaus: "Our preference for the parents over the experts is more than a matter of democratic conviction — . . . virtually all parents love their children. Very few experts love, or can love, most of the children in their care. . . . In addition, the parent, unlike the expert, has a long-term, open-ended commitment to the individual child." P. BERGER & R. NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 20-21 (1977).

Freud's attention. Through analyzing that process, "Freudian theory, wrongly accused of biological determinism, attempts to explain how the cultural heritage is acquired and internalized by each generation; it analyzed the psychic consequences of this process, showing, among other things, how these consequences differ in men and women."⁶⁰ A child who moves successfully through this most essential of socializing experiences learns to deal with his father figure in ways that enable him to succeed his "father" rather than to eliminate him. In other words, the child productively comes to terms with the whole concept of authority. As a result, the child is able "to internalize moral standards in the form of a conscience."⁶¹ Without such an experience, the child never does grow up. "Psychologically he remains in important ways a child, surrounded by authorities with whom he does not identify and whose authority he does not regard as legitimate."⁶²

The process of learning to live in an organized but free society involves more than merely sustaining a capitalist economy. The basic process of cultural transmission, without which the traditions and the fundamental values of the society are not passed on, depends upon the family. Only in the master-apprentice relationship of parent and child, committed to one another by the bonds of kinship, can the skills, normative standards, and virtues that maintain our cultural bedrock be transmitted.⁶³

60. C. LASCH, *supra* note 45, at 79.

61. *Id.* at 186.

62. *Id.* at 125. This view of Freud is broader than the interpretation that "we have to restrict sexual activity in order to get people to work." J. BERNARD, *supra* note 9, at 276. As a result, its validity is not disturbed by Herbert Marcuse's contention that "the inevitable decline in the need for work in modern societies renders Freud's identification of civilization with sexual repression no longer valid." *Id.* at 277.

63. Some see a disturbing decline in this element of the family's role, quite apart from fears about changes in family structure or alternative lifestyles. For instance, the thesis of Lasch's *Haven in a Heartless World* is that the family has, through the interaction of various social forces, lost the authority and the integrated set of functions without which there is no basic socialization process.

[T]he so-called functions of the family form an integrated system. It is inaccurate to speak of a variety of functions, some of which decline while others take on added importance. The only function of the family that matters is socialization; and when protection, work, and instruction in work have all been removed from the home, the child no longer identifies with his parents or internalizes their authority in the same way as before, if indeed he internalizes their authority at all.

C. LASCH, *supra* note 45, at 130. As a result,

Society itself has taken over socialization or subjected family socialization to increasingly effective control. Having thereby weakened the capacity for self-direction and self-control, it has undermined one of the principal sources of social cohesion, only to create new ones more constricting than the old, and ultimately more devastating in their impact on personal and political freedom.

Id. at 189.

C. *The Family in the Democratic Structure*

Today's mass society seems very personal, even chummy, if "Good Morning America" is our symbol: all 200-plus million of us in one big living room, chatting with our talk show hosts. Perhaps we no longer need Edmund Burke's advice: "To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections."⁶⁴ Yet modern civilization is paradoxically soaked through with a sense of anomie and alienation, heightened by feelings of helplessness against ever increasing concentrations of power in such "megastructures" as the business conglomerate, the boundless government bureaucracy, and the national labor union.⁶⁵ In the midst of it all, we long for identification with some "little platoon" that will create a sense of personal meaning and personal value for our lives. Thus, increased attention is being given to both the personal and the public policy significance of such "mediating" structures as neighborhoods, families, churches, schools, and voluntary associations:

Without institutionally reliable processes of mediation, the political order becomes detached from the values and realities of individual life. Deprived of its moral foundation, the political order is "delegitimated." When that happens, the political order must be secured by coercion rather than by consent. And when that happens, democracy disappears.

The attractiveness of totalitarianism . . . is that it overcomes the dichotomy of private and public existence by imposing on life one comprehensive order of meaning.⁶⁶

An inherent connection thus links the pattern of domestic regulation to the structure of political freedom.

Mediating structures are "the value-generating and value-maintaining agencies in society."⁶⁷ Therefore, when these structures are inactive, society must look to the megastructures — notably the State — as a source of values. The totalitarian State gladly and aggressively assumes that role. The democratic State, on the other hand, makes no claim to be a source of personal meaning and values, nor would we allow it to. That role contradicts the assumptions on which our entire political system rests. It might appear that our membership in such organizations as labor unions and consumer groups would restore a sense of the Status we have lost as society has

64. P. BERGER & R. NEUHAUS, *supra* note 59, at 4.

65. *See generally id.*

66. *Id.* at 3.

67. *Id.* at 6.

moved from Status to Contract. But those groups are organized primarily around shared economic and political interests. Even when they succeed, such groups do not claim to provide sources of meaning and values, or even personal identification.

A recent analysis of the concept of mediating structures identifies the family as "the major institution within the private sphere, and thus for many people the most valuable thing in their lives. Here they make their moral commitments, invest their emotions, [and] plan for the future"68 The family's role in providing emotional and spiritual comfort, as well as human fulfillment, has long been a dominant theme in sociological literature.

There is, however, an even more political meaning to the formal family's place as a mediating structure in our system. Our system is committed to pluralism and diversity as political values, because those values maximize the opportunity for individual choice and control. The pluralism we seek differs from anarchy, because anarchy destroys the order that makes pluralistic choices possible over the long term.⁶⁹ The balance we have struck seeks "to sustain as many particularities as possible, in the hope that most people will accept, discover, or devise one that fits."⁷⁰ In maintaining that balance, our system presupposes "a social system of family units, not just of isolated individuals."⁷¹ Those family units do "not simply co-exist with our constitutional system"; rather, they are "an integral part of it," because:

In democratic theory as well as in practice, it is in the family that children are expected to learn the values and beliefs that democratic institutions later draw on to determine group directions. The immensely important power of deciding about matters of early socialization has been allocated to the family, not to the government.⁷²

Monolithic control of the value transmission system is "a hallmark of totalitarianism";⁷³ thus, "for obvious reasons, the state nursery is the paradigm for a totalitarian society."⁷⁴ An essential element in

68. *Id.* at 19.

69. See note 464 *infra* and accompanying text.

70. P. BERGER & R. NEUHAUS, *supra* note 59, at 44.

71. Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U. L. REV. 765, 772 (1973).

72. *Id.* at 773; see also D. MURPHEY, *BURKEAN CONSERVATISM AND CLASSICAL LIBERALISM* 270 (1979) (Modern Social and Political Philosophies Series) (As "millions of separate families . . . raise their . . . children to reflect a variety of experiences and viewpoints," the family becomes "both a centrifugal and a centripetal force — and both aspects are necessary.").

73. P. BERGER & R. NEUHAUS, *supra* note 59, at 44.

74. D. MURPHEY, *supra* note 72, at 145.

maintaining a system of limited government is to deny state control over childrearing, simply because childrearing has such power. Even if the system remains democratic, massive state involvement with childrearing would invest the government "with the capacity to influence powerfully, through socialization, the future outcomes of democratic political processes."⁷⁵ That people "would remain legally free to believe and speak as they wished would not diminish the immense impact of centralizing the processes through which values and beliefs are instilled in the people who will later participate in group decision making."⁷⁶

Similarly, diversity and limited government are assured through a private property system that is often related to family control.⁷⁷ The familiar family function of providing social services for the sick, the young, and the disabled not only provides the psychological nurturing of personalized care, but also prevents the state from assuming the economic leverage and political power that would accompany total state responsibility for welfare functions.

Many informal "welfare" functions are provided by surprisingly durable kinship networks, even in today's highly mobile society. The kinship link in *Moore v. City of East Cleveland*⁷⁸ justified the Court's extension of substantive due process to include a household bound by extended family ties. Justice Powell's definition of "liberty" was obviously influenced by the presence of permanent, relational interests that sustain significant social interests as well as individual ones:

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. . . . Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home. . . . Especially in times of adversity . . . the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.⁷⁹

Empirical data bear out Powell's conclusion. Despite the decline

75. Heymann & Barzelay, *supra* note 71, at 773.

76. *Id.*

77. While still generally true, this proposition is less significant than it once was. See generally M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (1981). The effects of the diminished relationship between family ties and property interests have a way of validating the larger argument being made in this section of the text, however. For as property-related historical trends have "delivered [the individual] from family constraints and responsibilities," the more recent trends "have locked him into the cold embrace of public and private bureaucrats." *Id.* at 139.

78. 431 U.S. 494 (1977).

79. 431 U.S. at 504-05 (plurality opinion).

in the performance of some traditional functions, "the amount of social care that families provide for their elderly and handicapped members far exceeds the amount of social care provided by the state."⁸⁰ The sociologists in the recently updated Middletown project found that "most . . . families were linked to clusters of other families by bonds of kinship obligation and affection which often were far stronger than the ties connecting them to friends, co-workers, or fellow members of organizations."⁸¹ The researchers concluded, "the single most important fact about the nuclear family in contemporary Middletown is that it is *not* isolated" from kinship networks.⁸² From the standpoint of social structuring,

the kin groups organized on the basis of marriage and descent provide the substance which integrates people into the larger social structure. . . . The moral sentiments established in the interaction of parents and their children are extended and elaborated to produce consensus and loyalties which bind social groups (and possibly societies) into a cohesive whole.⁸³

Stable kinship groups thus contribute significantly to the achievement of general social and political stability.

Impermanent relationships that perform some intimate or associational "functions"⁸⁴ cannot claim the same position as marriage and kinship in ensuring a political structure that limits government, stabilizes social patterns, and protects pluralistic liberty through the power of its own relational permanency.⁸⁵ Social scientists may never succeed in verifying this conclusion empirically; the obstacles to meaningful comparative research appear insurmountable.⁸⁶ But

80. Zimmerman, *Reassessing the Effect of Public Policy on Family Functioning*, 59 Soc. CASEWORK 451, 452 (1978).

81. MIDDLETOWN FAMILIES, *supra* note 9, at 355.

82. *Id.* at 340.

83. B. FARBER, FAMILY AND KINSHIP IN MODERN SOCIETY 8-9 (1973) (footnote omitted).

84. Functional equivalency is a concept advanced by some who argue that informal associations may involve precisely the same economic, psychological, and social functions as formal ones; hence, the concept is a basic premise for those who argue that there should be "family" style legal protection for an infinite variety of relationships.

85. Informal *kinship* networks sometimes provide stability, continuity, and pluralistic value transmission. This is especially true among certain minority groups, where customary practices not legally formalized can be very influential. See, e.g., C. STACK, ALL OUR KIN (1974).

86. Some of the methodological problems are obvious. Selecting the same populations belonging to formal and informal domestic living arrangements, for example, poses an inherent challenge. Are the socioeconomic factors associated with marriage (age, education, income, etc.) independent variables to be controlled, or dependent variables through which the beneficial effects of formal family structures are mediated? More fundamentally, how are the informal "families" to be defined and selected in the first place? Social scientists must grapple with the same problems of clarity and generality that plague the attempt to confer legal status on informal arrangements. See Part I D *infra*. These difficulties suggest the problematic na-

the structure of formal family relationships both reflects and fosters the enduring personal commitments essential to social mediation and political pluralism.⁸⁷

Moreover, the structural power of the formal family is not totally dependent on its key function of value transmission in childrearing. Marriage alone plays a critical role in the democratic structure by interposing a significant legal entity between the individual and the State:

[T]he marriage bond . . . is the fundamental connecting link in Christian society. Break it, and you will have to go back to the overwhelming dominance of the State, which existed before the Christian era. The Roman State was all-powerful, the Roman Fathers represented the State, the Roman family was the father's estate, held more or less in fee for the State itself. It was the same in Greece, with not so much feeling for the *permanence* of property, but rather a dazzling splash of the moment's possessions. . . .

But, in either case, the family was the man, as representing the State. There are States where the family is the woman: or there have been. There are States where the family hardly exists, priest States where the priestly control is everything, even functioning as family control. Then there is the Soviet State, where again family is not supposed to exist

Now the question is, do we want to go back, or forward, to any of these forms of State Control? . . .

. . . [P]erhaps the greatest contribution to the social life of man made by Christianity is — marriage. . . . Christianity established the little autonomy of the family within the greater rule of the State. Christianity made marriage . . . not to be violated by the State. It is marriage, perhaps, which has given man the best of his freedom, given him his little kingdom of his own within the big kingdom of the State, given him his foothold of independence on which to stand and resist an unjust State. Man and wife, a king and queen with one or two subjects, and a few square yards of territory of their own: this, really, is marriage. It is a true freedom⁸⁸

ture of reliance on empirical studies to confirm or refute the assumptions which must be made, one way or another, in formulating a legal regime to govern domestic relationships.

87. See text accompanying notes 102-06 *infra*.

88. D. LAWRENCE, *A PROPOS OF LADY CHATTERLY'S LOVER* 35-36 (1973) (emphasis in original).

Sociologist Talcott Parsons has also observed:

[I]n a peculiar sense which is not equally applicable to other systems the marriage bond is, in our society, the main structural keystone of the kinship system. This results from the structural isolation of the conjugal family and the fact that the married couple are not supported by comparably strong kinship ties to other adults . . . In the American kinship system this kind of institutionalized support of the role of marriage partner through its interlocking with other kinship roles [as is characteristic of other societies] is, if not entirely lacking, at least very much weaker. A functionally equivalent substitute in motivation to conformity with the expectations of the role is clearly needed. It may hence be suggested that the *institutional* [i.e., state] sanction placed on the proper subjective sentiments of spouses . . . has this significance.

The political implications of social mediation (or its failure) thus offer a powerful justification for the special legal status of formal families.

D. *Marriage and Minority Status as Sources of Objective Jurisprudence*

Legal philosopher Lon Fuller listed "the generality of law" as the first of the principles he thought were necessary to create a true system of law. For Fuller, "the first and most obvious" route to "disaster" in creating and maintaining a legal system "lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis."⁸⁹ Justice Rehnquist made a similar point in dissenting from the Court's use of the "irrebuttable presumption" doctrine, which would require individualized determinations in certain equal protection cases:

Hundreds of years ago in England, before Parliament came to be thought of as a body having general lawmaking power, controversies were determined on an individualized basis without benefit of any general law. Most students of government consider the shift from this sort of determination, made on an *ad hoc* basis by the King's representative, to a relatively uniform body of rules enacted by a body exercising legislative authority, to have been a significant step forward in the achievement of a civilized political society.⁹⁰

Individualized determinations are necessary in such particularized litigation as custody determinations or procedural due process hearings. They may also be justified when highly protected constitutional interests are infringed.⁹¹ But the entire concept of "government by laws rather than government by men"⁹² is threatened if subjective determinations become the rule. There is an obvious administrative burden inherent in the proliferation of individual adjudication in derogation of legislative or judicial classification. Of perhaps greater significance is the power given the "King's representative" to make arbitrary judgments. The basis of Herbert Wechsler's criticism of Supreme Court opinions that "lack . . . reasoned generality" was that generality "will assure the Court's 'neu-

Parsons, *The Kinship System of the Contemporary United States*, 45 AM. ANTHROPOLOGIST 22, 30-31 (1943) (emphasis in original).

89. L. FULLER, *THE MORALITY OF LAW* 39 (2d ed. 1964).

90. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 657-58 (1974) (Rehnquist, J., dissenting).

91. Procedural due process may well perform this function. See also the arguable relationship between intermediate scrutiny and some doctrine or irrebuttable presumptions in L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1092-97 (1978).

92. MASS. CONST., pt. 1, art. XXX (1780).

trality'⁹³

Classifications based on marriage and minority status are among the best examples of the law's use of clear objective categories to achieve generality and reliable expectations that stabilize not only the determination of legal rights and duties, but also the entire social, economic, and political structure. Locke and Mill described the concept of minority status not as an arbitrary discrimination based on age, but as a rational discrimination based on capacity, designed both to protect children and to encourage the development of their mature capacities.⁹⁴ The concept has long stood as a key link between the family tradition and the individual tradition, with implications throughout the cultural system.⁹⁵ Minority status has been incorporated into a multitude of laws "seeking to protect minors from the consequences of decisions they are not yet prepared to make."⁹⁶ Objectivity has always been achieved in these laws through the use of "chronological age . . . even though it is perfectly obvious that such a yardstick is imprecise and perhaps even unjust in particular cases."⁹⁷

The significant place of marriage in the democratic political structure⁹⁸ reflects the extent to which marriage has become "an enormously important element in the rise of stable political systems and dynamic economies."⁹⁹

As Professor Hayek has rightly pointed out, the rise of the West is due in great part to its ability to define the law with certitude, and to uphold it against all comers — for legal certainty is the basis of investment and capital formation. At the heart of any stable law of property is a clear and universal legal doctrine of marriage, legitimacy and inheritance.¹⁰⁰

The development of marriage law throughout the sixteenth and seventeenth centuries "created the stable, sure and enlightened legal structure on which the Industrial Revolution was based, and without which it could not have taken place."¹⁰¹

The formal commitment of marriage is also the basis of stable

93. L. FULLER, *supra* note 89, at 48 n.5 (discussing H. WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* (1961)).

94. *See* Hafen, *supra* note 49, at 612-13.

95. *See generally id.*

96. *Planned Parenthood v. Danforth*, 428 U.S. 52, 104-05 (1976) (Stevens, J., dissenting).

97. 428 U.S. at 104-05.

98. *See* Part I C *supra*.

99. Johnson, *The Family as an Emblem of Freedom*, 2 (Am. Fam. Inst., 1980) (on file with the *Michigan Law Review*).

100. *Id.*

101. *Id.*

expectations in personal relationships. The willingness to marry permits important legal and personal assumptions to arise about one's intentions.¹⁰² Marriage, like adoption, carries with it a commitment toward permanence that places it in a different category of relational interests than if it were temporary. A "justifiable expectation . . . that [the] relationship will continue indefinitely"¹⁰³ permits parties to invest themselves in the relationship with a reasonable belief that the likelihood of future benefits warrants the attendant risks and inconvenience. There is a clear analogy between the motivational factors that influence human investment and those that influence economic investments. Jeremy Bentham believed that private ownership of property is more likely to maximize social utility than is collective ownership because "the human motivations which result in production are . . . such that they will not operate in the absence of secure expectations about future enjoyment of product." The will to labor and the will to invest "depend on rules which assure [people] that they will indeed be permitted to enjoy a substantial share of the product as the price of their labor or their risk of savings."¹⁰⁴

Legal marriage is more likely than is unmarried cohabitation to encourage such personal willingness to labor and "invest" in relationships with other people, whether child or adult. That is perhaps one reason why marriage has been given constitutional protection and cohabitation has not. By definition, those who enter into "non-binding commitments" rather than marriage are registering a non-committal intention. Christopher Lasch believes the current interest in these open-ended relationships reflects "the psychic needs of the late twentieth century," because it "condemns all expectations, standards, and codes of conduct as 'unrealistic.'" While some claim they must be "equals" to enter satisfactory interpersonal relationships, "equality in this connection means simply an absence of demands."¹⁰⁵

The absence of demands — even the absence of definition — for unmarried relationships makes it impossible to identify, much less enforce, an appropriate set of rights and duties in the relationship through objective legal rules. One study of cohabiting couples found

102. Note, for example, the assumptions made by a unanimous Supreme Court about an unwed father's willingness to assume responsibility for his child in *Quilloin v. Walcott*, discussed in text at note 149 *infra*.

103. *Smith v. Organization of Foster Families for Equality and Reform* (OFFER), 431 U.S. 816, 860 (1977) (Stewart, J., concurring).

104. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1212 (1967).

105. C. LASCH, *supra* note 45, at 140-41.

that each couple had a different view of the nature of their relationship, affected by whether they considered it a trial marriage, a substitute marriage, or a temporary involvement. Another key variable was the "current quality" of the relationship. That people are living together conveys no reliable assumptions about the nature of their expectations — economic, social, psychological, or otherwise. Thus, future researchers were warned against the hazard of treating unmarried cohabitants as a homogeneous group for any research purpose.¹⁰⁶

The natural boundary created by the objective nature of legal marriage — the boundary recognized by the Court for purposes of constitutional protection — is significant for several reasons. Once these limits are breached, there is no realistic boundary in sight that will confine constitutional privacy according to any meaningful standards. A boundary based on the degree of commitment to a relationship or individuals' expectations regarding a relationship's permanence would require intolerable inquiries into the most private realm of these individuals' lives. Yet without such inquiries, extending protection to any informal relationship would require extending protection to "casual sexual intimacies," which one advocate of a broad right of intimate association acknowledges as "an American disease" that is "the exact antithesis of the intimacy that involves caring."¹⁰⁷ Even if inquiries were permitted, the prospect of evaluating the variables in each relationship is so discouraging that no relationships would be likely to receive very broad legal protection, thereby undercutting both the individual and the social interest in a constitutional "right to marry."

The claims arising from such an unlimited spectrum of relationships would necessarily be contractual in nature, with no overtones of Status as a source of obligation. The power of family life to develop public virtue and to promote the ends of a democratic society would therefore be seriously impaired.¹⁰⁸ In that event, the very justification for granting extraordinary constitutional protection to marriage is also reduced, as "marriage" could essentially be transformed into an economic partnership. Absent the advantages discussed in the immediately preceding sections, there would be no more reason for the Court to give preferred protection to these economic relations than it does to any other economic interests under its present sub-

106. Lewis, Spanier, Atkinson & LeHecka, *Commitment in Married and Unmarried Cohabitation*, 10 Soc. Focus 367, 371 (1977).

107. Karst, *supra* note 11, at 633 & n.45.

108. See Part I *supra*.

stantive due process posture.¹⁰⁹ Thus a contractual basis for personal relationships would likely invite more, not less, state intervention into the relationship.

The law's traditional (and present) posture toward regulation of an ongoing marriage is to stay out of it, even when a judge could obviously resolve the marital differences, because the price for resolving the immediate problem in court is likely to be the relationship itself.¹¹⁰ The "formal law," whether statutory or contractual, is simply *unable to regulate* intimate relationships and still serve the overriding purpose of encouraging and preserving continuity in those relationships.¹¹¹ If a cohabiting couple were seen as a partnership rather than a marriage, enforcement of individual claims could easily receive greater priority than the continuity of the relationship. Cohabiting partners would probably experience less judicial intervention in *terminating* their relationship than is presently true of divorce, but that may be small compensation for the uncertainty they could experience in not knowing whether their relationship has been terminated in a way that discharges underlying obligations.

The Court's own work in the family cases provides a sneak preview of what it would be like for judges to determine whether an individual relationship is "meaningful" enough to be considered the functional equivalent of marriage. The unwed fathers cases¹¹² and the minors' abortion cases¹¹³ illustrate the problems of subjective determinations in family relations, as they require judicial findings regarding the substantiality of a father-child relationship or the "maturity" of a pregnant minor. Homer Clark found the Court's foray into the area of illegitimacy to be a mixed blessing, primarily because the Court was willing to invalidate discrimination against illegitimates in some contexts but not in others. This approach raises more questions than previously existed about the "status" of illegitimate children. "[I]t is . . . hardly a sensible policy to limit future legal responses to social problems by constitutional principles having

109. See notes 403-04 *infra* and accompanying text.

110. [I]ntervention, rather than preventing or healing a disruption, would quite likely serve as the spark to a smoldering fire. A mandatory court decree supporting the position of one parent against the other would hardly be a composing situation for the unsuccessful parent to be confronted with daily. One spouse could hardly be expected to entertain a tender, affectionate regard for the other spouse who brings him or her under restraint. The judicial mind and conscience is repelled by the thought of disruption of the sacred marital relationship
Kilgrew v. Kilgrew, 268 Ala. 475, 479-80, 107 So. 2d 885, 889 (1959).

111. See generally Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1 (1969).

112. See Part II B *infra*.

113. See notes 235-39 *infra* and accompanying text.

the dual disadvantages of rigidity and uncertainty.”¹¹⁴

Watching the Court weave and bob its way through the bewildering thickets of interpersonal relations in these cases gives rise to a larger question about the jurisprudence of adjudicating the constitutional issues so recently discovered in the family law domain. Family law has always been longer on practice than on theory. With a fairly simple theoretical framework, judges in family cases have concentrated largely on the intensely practical problems that arise in divorce, custody, neglect, and similar contexts. The introduction of high-powered constitutional doctrines into this arena does not alter the basic need in most cases to balance conflicting personal interests among family members — most of whom are usually entitled to similar “constitutional rights.”

Concepts such as marriage and minority status have played a supremely important role over the years in staking out broad, clear boundaries that give guidance to an arm of the legal system that is already overwhelmed with subjective determinations. Given the difficulties the Supreme Court has had, even with those concepts basically intact, one can only imagine what would happen from a jurisprudential perspective if marriage and minority status were to fall by the wayside in the quest for individual fairness. The understandable, but misguided, quest for individualized determinations of legally recognizable intimate associations is likely to be encouraged by excessive zeal for subjective jurisprudence — and vice versa. Up to this point, marriage and minority status remain fixed stars in the legal system. To the extent that they begin to drift, both as legal and as social concepts, to that extent will our jurisprudence drift from a system that encourages stable expectations to one that discourages them.

Of course, it would be equally foolish to insist on a system so stable that no flexibility is possible. The practical adequacy of the present constitutional boundary has been aided by the reforms of recent years in the areas of women’s rights and divorce. These reforms, together with the Court’s recognition of certain exceptional needs outside married nuclear families, go a long way toward rebutting the criticism that the formal family is too narrow a concept to serve as a legal paradigm in a pluralistic society.¹¹⁵ As described by

114. Clark, *Constitutional Protection of the Illegitimate Child?*, 12 U.C.D. L. REV. 383, 411 (1979).

115. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1238-39 (1974). The author concludes that marriage contracts better provide for flexible marriages. *Id.* at 1249-50.

one family scholar, the historical developments of the past century have shifted from viewing the family as a rigid, monolithic structure toward viewing it as a flexible form that assumes "private motivations for forming and maintaining marriages" and presupposes "a considerable amount of variation in the norms of family which people actually follow." This development is related to the pervasive democratization of industrial society, which has "extensive marriage markets, requiring a tolerance for diverse norms."¹¹⁶ As a result, "married couples can and do arrange the style of their marital lives in many different ways," matching the pluralism of contemporary society.¹¹⁷ This means in practice that the circle of legally and socially acceptable family patterns includes working mothers, families headed by women, families in which fathers share housework, and families without children. In a general way, American families increasingly reflect patterns in which "husband and wife have equal status and authority[,] major decisions are by consensus[,] and . . . common interests and activities coexist with division of labor and individuality of interests."¹¹⁸

These social developments have been reflected in changing legal patterns that maximize individual choice in allowing greater — but still orderly — access to and exit from legal marriage, both in the name of the freedom to marry. In addition, the trend of both statutory and case law has been toward equalizing the economic relationship of husband and wife and toward minimizing sex-based stereotypes in decisions related to child custody and other marital termination issues.¹¹⁹ It is therefore inaccurate to regard present domestic relations law as oppressively rigid, imposing on unwilling couples such unalterable assumptions as nonterminable marriage, strict divisions of labor between husband and wife, husbands as the sole source of support, or the assumption that each marriage is a first marriage that will produce children.¹²⁰

Whether the bonds of marriage lead to personal fulfillment or oppression is a question on which sharp differences exist, obviously reflecting the variety of marital experiences. Existing law has created outlets that permit the legal system to continue giving prefer-

116. B. FARBER, *supra* note 83, at 52.

117. Rheinstein, *The Transformation of Marriage and the Law*, 68 NW. U. L. REV. 463, 478 (1973).

118. E. BURGESS, H. LOCKE & M. THOMES, *THE FAMILY, FROM INSTITUTION TO COMPANIONSHIP* 4 (1963).

119. See generally Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 706-11 (1976).

120. *But see* Weitzman, *supra* note 115, at 1170-235.

ence to formal relationships in ways that do not exact unbearable sacrifices from those for whom the marriage bonds really are bondage. At the same time, the policy preference for formal commitments acts to create not only more stable expectations and a more objective system of adjudication, it also offers at least some hope that Americans may yet discover that the contemporary fascination with liberation from personal commitments may not be all that it promises.¹²¹

II. KINSHIP AND MARRIAGE: A CONSTITUTIONAL HOME FOR FAMILY INTERESTS

The Supreme Court has created impressive protections for family relationships, despite the absence of any mention of the family in the text of the Constitution. As early as 1888, the Court described marriage as "the most important relation in life"¹²² and "the foundation of the family and of society, without which there would be neither civilization nor progress."¹²³ In 1923, the Court gave constitutional status to the right of parents to direct the upbringing of their children without undue state interference.¹²⁴ The Court first recognized the constitutional right of privacy in 1965 as an inherent characteristic of marriage, which the Court called "intimate to the degree of being sacred."¹²⁵

Rather than providing authority for some dramatic reordering of the intimacies and personal relationships protected by the Constitution, the fifty or so Supreme Court decisions that now touch on fam-

121. The spirit of emancipation has . . . touched deep nerves of truth [but it also reflects] . . . the blind side of our age, and the cost of the blindness; [and] a perhaps fatal stupidity intertwined with our enlightenment. The idea of emancipation, after all, has to do with an escape from bonds, not a strengthening of bonds. Emancipation has to do with power, not love . . . I don't think that it's a coincidence . . . that more and more people are living alone these days . . .

. . . [There is a] general sense of the transformation of our society from one that strengthens the bonds between people to one that is, at best, indifferent to them; a sense of an inevitable fraying of the net of connections between people at many critical intersections, of which the marital knot is only one. . . . If one examines these points of disintegration separately, one finds they have a common cause — the overriding value placed on the idea of individual emancipation and fulfillment, in the light of which, more and more, the old bonds are seen not as enriching but as confining. We are coming to look upon life as a lone adventure, a great personal odyssey, and there is much in this view which is exhilarating and strengthening, but we seem to be carrying it to such an extreme that if each of us is an Odysseus, he is an Odysseus with no Telemachus to pursue him, with no Ithaca to long for, with no Penelope to return to — an Odysseus on a journey that has been rendered pointless by becoming limitless.

Talk of the Town, NEW YORKER, Aug. 30, 1976, at 21-22 (quoting an anonymous letter).

122. *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

123. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

124. *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).

125. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

ily interests effectively define a "family" as persons related by blood, marriage, or adoption. Thus, the interests protected by the Court's categories of constitutional protection advance the social policies just outlined and thereby give principled content to the decisions.

The Court's work in this area has not been without missteps and theoretical confusion; indeed, much of its guidance seems to have come more from intuition than from a set of coherent principles. The court has also made only occasional efforts to articulate the policies underlying its preference for kinship and marriage in a way that would clearly define the kinds of interests that should be protected. However, as shown in Part I, the policies can be identified and then more fully articulated. When they are, a rational distinction emerges between formal families and unrelated persons. As will be shown in Part III, the cases can also be reconciled into a pattern of constitutional analysis that will convey more certain signals to lower courts as well as encouraging more sure footing for the Court's work in the future. Sure footing is especially important as the Court wanders in a wilderness of constitutional interpretation where the lack of an explicit text and the inherent subjectivity of all perspectives on the subject matter make the terrain as treacherous as it is significant.

For the purpose of this descriptive summary, I will group the cases into eight categories: (A) the illegitimacy cases; (B) the unwed fathers' cases; (C) the foster parents case; (D) the right to marry cases; (E) the minority status cases; (F) the first amendment cases; (G) the contraception and abortion cases; and (H) sexual privacy.

A. *The Illegitimacy Cases*

At the outset, a general observation about relational interests in family law is in order, pertaining not only to the illegitimacy cases, but to other cases as well. There always has been tension between "society's condemnation of irresponsible liaisons beyond the bonds of marriage"¹²⁶ and society's regard for the child-parent relationship. That relationship is, after all, one of kinship. Despite the existence over many centuries of legal measures designed to discourage sex outside marriage, our society has not been willing to terminate the parental rights of an unwed mother on the ground that her conduct has made her, per se, an unfit parent. Our attitudes on this subject were captured more than a century ago in Nathaniel Hawthorne's classic story of the unwed mother, *The Scarlet Letter*:

"Hester Prynne," said [Governor Bellingham] ". . . there hath

126. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

been much question concerning thee, of late. The point has been weightily discussed, whether we, that are of authority and influence, do well discharge our consciences by trusting an immortal soul, such as there is in yonder child, to the guidance of one who hath stumbled and fallen, amid the pitfalls of this world”

. . . .
Hester caught hold of Pearl, and drew her forcibly into her arms, confronting the old puritan magistrate with almost a fierce expression. . . . She felt that she possessed indefeasible rights against the world, and was ready to defend them to the death.

. . . .
“God gave me the child!” cried she. . . . “Ye shall not take her! I will die first!”

“There is truth in what she says,” began [young minister Dimmesdale] “God gave her the child, and gave her, too, an instinctive knowledge of its nature and requirements . . . which no other mortal being can possess. And, moreover, *is there not a quality of awful sacredness in the relation between this mother and this child?*”¹²⁷

The recognition of parental rights in such a case arises from the law’s respect for kinship, which exists despite the law’s preference that kinship arise from marriage.

At the same time, laws discriminating against illegitimate children have existed for many years, expressing what one authority has called society’s “wish to assure that children would be born within institutional structures capable of raising them — stable families.”¹²⁸ It has nonetheless become increasingly clear, especially during the last century, that removal of many of the legal disabilities attaching to a child’s illegitimate status can respond to the demands of equity without violating the principled framework of blood, marriage, and adoption.

In a number of cases since 1968, the Supreme Court has boosted the longstanding illegitimacy reform movement by extending “intermediate scrutiny” equal protection doctrines to cover several major aspects of an illegitimate child’s relational interest with one or both of his parents.¹²⁹ In all of these cases, the Court has recognized only the relationship between a child and an unwed parent,¹³⁰ *never* the

127. N. HAWTHORNE, *THE SCARLET LETTER* 131-35 (1850) (emphasis added).

128. H. KRAUSE, *ILLEGITIMACY* 1 (1971).

129. It is unnecessary to the purpose of this discussion to pursue the problems raised by arguably inconsistent outcomes in some of the Court’s various illegitimacy cases. A recent summary of the cases, and an attempt to reconcile their results, is contained in Comment, *Equal Protection for Illegitimate Children: A Consistent Rule Emerges*, 1980 B.Y.U. L. REV. 142.

130. One of the illegitimacy cases upheld the right of an unwed mother to sue for the wrongful death of her child. *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968). That case has been criticized for undermining the “legal commitment” undertaken when a

relationship between the two parents.¹³¹ Indeed, in one of the cases, the Court echoed the policy themes of the preceding section by describing the state's interest in encouraging formal marriage and the stability of family life as something "no one disputes" because the family is regarded as "perhaps the most fundamental social institution of our society."¹³² Decisions to protect illegitimate children who live with a parent are not based merely on the "functional equivalence" of legitimate child-parent relationships. In holding that the benefits of workmen's compensation laws may not be limited to dependent *legitimate* children, the Court made clear that its ruling "will not expand claimants . . . beyond those in a direct blood and dependency relationship with the deceased . . ."¹³³ There is a substantial basis for reliance on the blood tie, because "biological relationship *is* the test that has been used — since time immemorial — in our and other cultures for the fixing of support and other familial obligations, and it is *biological* relationship that underlies and is traced by legal relationship."¹³⁴

An enormous rise in both the nation's illegitimacy rate and the level of related welfare outlays has paralleled the development of the case law giving economic protection to illegitimate children. As a result, increased economic assistance has also been given to unmarried parents who receive welfare aid intended to benefit their children. Welfare aid for illegitimate children may have increased not only the illegitimacy rates, but also the number of families choosing to function without parental marriages.¹³⁵ Thus, while the illegiti-

man and woman marry. Glendon, *supra* note 119, at 714-15. However, the relationship recognized by the Court was the mother-child relationship, not the father-mother relationship. Therefore, the case simply recognized an aspect of the unwed mother's interest in her child that had long been upheld in other legal contexts.

131. In *Califano v. Boles*, 443 U.S. 282 (1979), the Court upheld a Social Security Act provision that gave survivors' benefits to widows and divorced wives of wage earners, but not to the unwed mothers of the survivors' children — even when the illegitimate children qualified for benefits. The use of marital status was held to be an acceptable index for determining dependency on a wage earner. The indirect effect on the children involved was insufficient to require the higher level of scrutiny applied when there is discrimination against illegitimate children. Also, the wrongful death claim of an unmarried cohabitant was rejected by a federal trial court in *Vogel v. Pan Am. World Airways, Inc.*, 450 F. Supp. 224, 226-27 (S.D.N.Y. 1978). The court rejected plaintiff's argument that she was protected by the theory of the illegitimacy cases, noting that the relationship between unmarried cohabitants is not permanent as is the child-parent relationship outside marriage, the relationship is more difficult to document, and illegitimacy policies directed at adults are more fair than those directed at children.

132. *Trimble v. Gordon*, 430 U.S. 762, 769 (1977).

133. *Weber v. Aetna Cas. & Sur. Co.*, 407 U.S. 164, 175 (1972).

134. H. KRAUSE, *supra* note 128, at 69.

135. The problem of how to assist needy children without encouraging their parents to remain unmarried is therefore a serious one, the implications of which are beyond the scope of this Article. Welfare programs that have the effect of offering financial incentives for mothers

macy cases are consistent with traditional "kinship" criteria in defining a constitutionally protected family relationship, the cases have been seen as contributing to the "withering of marriage," perhaps because of the exploitation of welfare incentives.¹³⁶ The cases also inevitably disturb, to some extent, "a wide variety of laws designed to encourage legally recognized and responsible family relationships."¹³⁷

Lest more be made of the cases than they warrant, however, it may be noted that the constitutional protection they extend is not based on some revolutionary view of illegitimate children tantamount to the revolution that would be involved in extending constitutional protection to relationships between unmarried adults. The relationship between the unwed mother and her child has always created the need for some legal protection. The illegitimacy reform movement traces its beginnings and some of its progress to a time much earlier than the Supreme Court's involvement.¹³⁸ As for the fear that imposing legal duties on the parent-child relationship outside marriage will discourage formal marriage, Harry Krause observes:

The law's failure to impose a substantial economic burden on the father of an illegitimate child may be more likely to encourage illegitimacy than marriage! In short, it is most doubtful that there is an effective connection between the legislated stigma of illegitimacy and the state's purpose of encouraging marriage and discouraging promiscuity.¹³⁹

The policy favoring formal marriage seeks, among other things, to maximize the stability of a child's home environment. When a child is born outside marriage, the interest in stability is less likely to be realized.¹⁴⁰ But by then, enforcement of the "first choice" prefer-

to remain unmarried have been widely denounced. *See, e.g.*, M. BANE, *supra* note 9, at 135; G. GILDER, *supra* note 28, at 173-74; K. KENISTON, *supra* note 9, at 99-101.

136. The post-1968 transformation of the law of illegitimacy in the United States has followed the world-wide pattern of approximating the status of the child born outside marriage to that of the child born within marriage. The more fully the two statuses are approximated, the more legal marriage loses one of its most traditional and important effects — distinguishing the legitimate family from all others. . . . The legal institution is being drained of some of its content by the increasing number and social acceptance of births outside legal marriage.

Glendon, *supra* note 119, at 714-15 (footnotes omitted).

137. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 184 (1972) (Rehnquist, J., dissenting).

138. *See generally* H. KRAUSE, *supra* note 128.

139. H. KRAUSE, *supra* note 128, at 75 (footnote omitted).

140. It has been argued that the real basis for the legitimate/illegitimate distinction is not a concern for the stability of a child's environment, but is "an effort at social control of female behavior." Wallach & Tenoso, *A Vindication of the Rights of Unmarried Mothers and Their Children: An Analysis of the Institution of Illegitimacy, Equal Protection, and the Uniform Parentage Act*, 23 U. KAN. L. REV. 23, 25 (1974) (emphasis omitted). The assumption that "the

ence for marriage by withholding entitlements needed by the child reduces even further the child's hopes for an adequate environment. Enforcement of the preference at that stage is also unlikely to result in marriage, partly because of the timing and partly because the enforcement pressure is directed at the child, who is the wrong party. Society's long term interest in its children may therefore be better served, once an illegitimate birth has occurred, by resort to the "second choice" policy of allowing entitlements a child clearly needs, even though in a less stable environment.

This same relationship between first and second choice policies does not apply to the claims of unmarried cohabitants. In their case, enforcement of the preference for marriage is directed at the parties under whose control the marriage decision rests. Also, there is no harm comparable to what a child suffers because neither adult is dependent in any sense even approaching the dependency of a child. Finally, enforcement of the first choice preference for marriage at a stage when a relationship has not yet produced children increases the likelihood that children born of the relationship will enter a stable environment. For reasons such as these, discrimination between married and unmarried couples is very different from discrimination between legitimate and illegitimate children.

B. *The Unwed Fathers Cases*

In the 1972 case of *Stanley v. Illinois*,¹⁴¹ the Court sent shock waves through the world of adoption services by holding that an unwed father had a constitutionally protected parental interest in his children following the death of their mother. Stanley had fathered three children during an eighteen-year unmarried relationship with their mother, but Illinois law did not recognize his claim of a parental interest. The Court found the law a violation of procedural due

institution of illegitimacy implements the principle of legitimacy by coercing women into marriage, which submerges their identities and limits their freedom" presumably sees in the illegitimacy cases the early steps toward recognizing "the unit composed of a woman and her offspring" as an alternative "first choice" lifestyle form of family life. Recognition of that kind of family unit as a matter of "freedom of choice in procreation and personal association," *id.* at 28, is not far removed from recognizing a considerable variety of forms of "intimate association" as legitimate alternatives to the formal family. See Karst, *supra* note 11. Advocates for this point of view have stated: "[T]he real question . . . is whether the state has any valid interest in promoting nuclear families and deterring illegitimacy." Wallach & Tenoso, *supra*, at 62 (emphasis in original). This question may find some response in considering the social interest in marriage. See Part I *supra*. Consider also the cases made by Justices Stewart and Stevens in describing both the state's and children's interest in promoting the welfare of illegitimate children. See *Caban v. Mohammed*, 441 U.S. 380, 394, (1979) (Stewart, J., dissenting); 441 U.S. at 401 (Stevens, J., dissenting).

141. 405 U.S. 645 (1972).

process because it deprived Stanley of his parental rights without a hearing and unfairly discriminated between married and unmarried parents. Expansive dicta in the case¹⁴² implied that the Court might be adopting a major change in attitude toward informal marriages and that all unwed fathers might thereafter have all the rights of married fathers.

The facts of *Stanley* do not support such a broad interpretation. Stanley unambiguously acknowledged his children. He had lived with and supported them all of their lives.¹⁴³ The Court seems merely to have recognized the kinship ties which also bind unwed mothers to their children. Nothing about *Stanley* or its progeny implies protection for the father-mother relationship. Still, the general unavailability of putative fathers when unwed mothers place their children for adoption made the matter of paternal consent a perplexing prospect after *Stanley*.

The two cases since *Stanley*, *Quilloin v. Walcott*¹⁴⁴ and *Caban v. Mohammed*,¹⁴⁵ make clear that there is no constitutional protection for the father who does not admit paternity early enough to establish over time a significant relationship with his child. The present attitude toward fathers during a child's infancy resembles the basis for the common law's disregard of the putative father — "the fact that his identity was often uncertain and that he was stereotyped as irresponsible and unconcerned about his child."¹⁴⁶ Only when a father has admitted his paternity, "established a substantial relationship with the child,"¹⁴⁷ and "shouldered significant responsibility" for his child,¹⁴⁸ will his parental interests receive constitutional protection. Fathers willing to take such steps do have substantially greater rights to withhold consent to adoptions of their children than they enjoyed prior to *Stanley*.

The *Quilloin* case makes a telling point about the difference between formal marriage and unmarried cohabitation. In that case, the Court upheld an adoption objected to by an unwed father (*Quilloin*) who had established a superficial relationship with his child

142. "Nor has the law refused to recognize those family relationships unlegitimated by a marriage ceremony." 405 U.S. at 651. Given the *Stanley* context, this reference is probably to the kinship tie so long recognized between unwed mothers and their children.

143. 405 U.S. at 650 n.4.

144. 434 U.S. 246 (1978).

145. 441 U.S. 380 (1979).

146. Note, *The Putative Father's Parental Rights: A Focus on "Family"*, 58 NEB. L. REV. 610, 611 (1979) (footnotes omitted).

147. 441 U.S. at 393.

148. 434 U.S. at 256.

over several years. Quilloin proved that he had been legally obligated to provide child support, an obligation which he had occasionally honored. He also showed that he had visited the child many times in the home where the child lived with the mother and the man she married within a few years after the child's birth. Quilloin argued on equal protection grounds that his relationship was functionally equivalent to that of a married father who is separated or divorced but still provides child support and has visitation rights. Speaking through Justice Marshall, the Court unanimously rejected Quilloin's argument, noting that he had never had legal custody of his child:

[L]egal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage. Under any standard of review, the State was not foreclosed from recognizing *this difference in the extent of the commitment to the welfare of the child*.¹⁴⁹

The members of the Court must have known that not every "father whose marriage has broken apart" will actually "have borne full responsibility for the rearing of his children during the period of the marriage." One could easily find a married father who had done less for his children than Leon Quilloin did for his child. Yet, regardless of what the married father might actually do, the State was permitted to maintain "under any standard of review" a presumptive statutory preference for the married father over the unmarried father so significant that it resulted in permanent termination of the unmarried father's rights.

This harsh difference between the law's treatment of a married man and an unmarried man was justified because of what Justice Marshall called a "difference in the extent of the commitment to the welfare of the child." In other words, a man's unwillingness to marry (assuming the woman is willing) raises a very believable presumption that he is unwilling to make long-term commitments to his children — and probably to their mother as well. Under *Caban*, an unmarried father can overcome the presumption of his noncommitment, but only by showing he has shouldered significant responsibility in caring for the child on a daily basis over a period of years.¹⁵⁰ This test may suffice as a tool of hindsight, but those concerned about the welfare of an illegitimate infant cannot keep the child indefinitely in limbo, waiting to see what "functional equivalents" of

149. 434 U.S. at 256 (emphasis added).

150. See 441 U.S. at 393; 441 U.S. at 382.

marriage the father will demonstrate if he is given plenty of time. It is not difficult to sense the risks to a child in such circumstances, knowing as we do how much every child needs a sense of continuity and stability in the child-parent relationship.¹⁵¹ Quilloin's waiting child is a vivid symbol of the way all persons wait in a noncommittal relationship, whether child or adult, at risk in a sea of uncertain expectations.

The marriage commitment enables the courts, as well as those most personally involved, to make certain assumptions — even knowing they will at times be disappointed — about what to expect. A man's marriage commitment gives rise to the legitimate presumption that he will make the long-term commitments his children need. The state acts reasonably in not extending the same assumption to an unwed father. A unanimous Court saw that readily in *Quilloin*. In circumstances as clear as those suggested by the symbol of the waiting child, the Court did not hesitate to disregard noble phrases associated with individual parental liberty in favor of the pedestrian presumptions and classifications that have guided legislators and family law judges for years in comparing married and unmarried couples. This case illustrates that the Court's instincts will restrain — more than will its theories — the excesses of having just discovered that dads are people, too.

The *Caban* case illustrates the complications that may follow in granting constitutional protection for one individual amid a variety of family interests and relationships, each of which may claim a preferred status. *Caban* was essentially a custody dispute between an unwed father and an unwed mother, both of whom had married other persons since their two children were born. Both parents sought to adopt the children. Choosing neither to recognize any relationship between the parents nor to resolve the dispute between them, the Court simply declared unconstitutional on sex discrimination grounds a New York law which permitted an unwed mother, but not an unwed father, to veto the proposed adoption of her children. The Court thus compared the rights of unwed fathers not with those of married fathers, but with the rights of unwed mothers.¹⁵² Without telling the state how it should resolve the custody issue, the Court merely declared that the state could not rely upon a statute favoring the mother "in all circumstances."¹⁵³ The effect of this result, noted by Justice Stevens in dissent, was that both natural par-

151. See generally J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 39.

152. See 441 U.S. at 388.

153. 441 U.S. at 394.

ents "are given a veto," so that "neither may adopt and the children will remain illegitimate."¹⁵⁴ Perhaps the Court would have regarded the "well being of legitimate children"¹⁵⁵ differently if it had been asked to consider the interests of the children in their own right rather than looking at the state interest in providing for them, especially in light of the Court's strong precedents establishing a relatively preferred constitutional position for illegitimate children. The broad language of *Stanley* had been written in support of paternal interests when there were no countervailing claims from the children or their mother; therefore, it was possible to view unwed fathers' rights as protecting "the integrity of the family unit." Because protecting the unwed father's right apparently left the *Caban* children illegitimate, it is less clear how family integrity was protected in that case. To invoke civil rights doctrines in domestic relations cases may not tell our judges much more than they already know about assessing the relative weight of the individual rights that collide with each other in so many family conflicts.

The unwed father cases also illustrate the inconsistencies that arise when legal interests are made to depend on the shifting subjective factors of each individual circumstance rather than deriving from fixed concepts such as marriage or minority status. Suppose that just before the Quilloin child was adopted by his stepfather, Leon Quilloin had died as the result of a tortious injury. Under the doctrines of the illegitimacy cases, the child would probably be entitled to a wrongful death action, even though, as it turned out, Quilloin had no parental rights in the adoption proceeding. Next, consider the incongruities of New York law as applied to the facts of *Caban*. Shortly before ruling in *Caban* that the father of an "older" illegitimate child had enough of a parental right to block his child's adoption by another man, the Court had also upheld the constitu-

154. 441 U.S. at 412. The state court denied *Caban's* petition to adopt the children solely because he was unable to obtain their mother's consent, as required by the statute. 441 U.S. at 384. Because the statute is no longer valid, the court could find some other basis upon which to grant the adoption petition of one party or the other. But if the Supreme Court's decision is construed to give the father the same veto power over the mother's petition that she exercised over his, the stalemate over adoption leaves the children illegitimate.

155. Justice Powell's majority opinion recognized that "[t]he State's interest in providing for the well being of legitimate children is an important one[.]" 411 U.S. at 391, but he did not believe the gender-based discrimination between fathers and mothers bore a substantial relation to that interest, at least "[w]hen the adoption of an older child is sought." 441 U.S. at 392. Justice Stewart, dissenting, argued that, "Unlike the children of married parents, illegitimate children begin life with formidable handicaps. . . . Adoption provides perhaps the most generally available way of removing these handicaps." 441 U.S. at 395. Speaking for the other three dissenters, Justice Stevens wrote, "The state interest in facilitating adoption in appropriate cases is strong — perhaps even 'compelling.'" 441 U.S. at 402.

tionality of a New York law requiring an illegitimate child to prove paternity before being permitted any inheritance rights.¹⁵⁶ Thus, the *Caban* children had enough of a tie to their father that they could not be adopted without the father's consent, but not enough of a tie that they would be permitted to inherit from that same father if he died without formal proof of paternity. Such inconsistent results are unlikely when marriage anchors the nature of the relationships.

These cases also raise a serious question concerning the Court's willingness to make subjective factual judgments. Justice Powell's majority opinion in *Caban* discusses the special status of older children.¹⁵⁷ Yet Justice Powell seems unwilling to commit himself on such factual questions as how older children are to be distinguished from infants and what is a substantial enough relationship between a father and child to give rise to a parental right. As the swing man in many of the illegitimacy cases, Justice Powell has been similarly preoccupied with drawing minute factual distinctions in one case after another. In still another family law context, the Court has recently favored individualized judicial assessments of "maturity" as a condition of determining whether an unmarried minor may obtain an abortion.¹⁵⁸ Such prospects convey — with a sense of déjà vu — overtones of the courts' dubious role in needing to review endless numbers of arguably obscene books and movies. With such relatively fixed categories as marriage and minority status, we have already been clever enough to devise objective criteria designed not only to conserve judicial energy, but also to let society know what the law expects without asking judges to review the intimate details of endless questions about motives, relationships, and other subjective imponderables. In other words, there is an important relationship between preserving a system of marriage and a system of jurisprudence.¹⁵⁹

C. *The Foster Parents Case*

In *Smith v. Organization of Foster Families for Equality and Reform (OFFER)*,¹⁶⁰ the Court addressed the issue of constitutional standards for the removal of foster children from the care of foster parents. Without definitely deciding whether foster parents have a liberty interest sufficient to require the application of procedural due

156. *Lalli v. Lalli*, 439 U.S. 259 (1978).

157. *See* 441 U.S. at 389, 392.

158. *See* notes 235-39 *infra* and accompanying text.

159. *See* Part I D *supra*.

160. 431 U.S. 816 (1977).

process standards, the Court unanimously found New York's removal procedures adequate to satisfy whatever interests the foster parents may have. The foster parents group had argued that the state procedures were inadequate because they did not require an automatic prerule hearing.

Foster care relationships are yet another unavoidable exception to traditional family patterns, necessitated when natural families are unable to provide normal care for a variety of reasons. Present state policies generally assume that foster care is temporary and that, as a result, foster parents should avoid deep emotional involvements. The plaintiffs in *OFFER* represented a different viewpoint, arguing that foster relationships lasting more than a year should be characterized by greater emotional involvement because strong psychological ties aid the developmental needs of the foster children.¹⁶¹ Implicitly acknowledging that the extent of psychological commitment in a foster care relationship could be significant, the Court still found that the *nature* of the foster parents' constitutional interest (regardless of the *weight* of the interest from an emotional viewpoint) did not rise to the level of natural parents' interests. The Court pointed out that recognition of rights in the foster parents could affect the rights of the child's natural parents.¹⁶² Moreover, the foster parents' interest originates in a state contract, while the interests of natural parents originate in "intrinsic human rights" that are antecedent to the state.¹⁶³ The Court also considered the "expectations and entitlements of the parties" to a foster care arrangement as defined by state law, but found there only "the most limited constitutional 'liberty' in the foster family":¹⁶⁴ expectations in foster relationships are by definition temporary.¹⁶⁵ Even so, the Court regarded the foster family as more than "a mere collection of unrelated individuals"

161. [The avoidance of emotional child-parent involvement] defeats the very intentions of the decision to move from professional institutional care to family care. Where foster parents heed the warning given and fulfill their task with the reservations implied in a semi-professional attitude they evoke in the child a reduced response as well, too lukewarm to serve the infant's developmental needs for emotional progress or the older child's needs for relatedness and identification.

J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 39, at 25-26. These authors would also prefer to see more effort made to maintain contact between the child and his absent natural parents, where possible; but once the "prior tie has been broken, the foster or other temporary placements can no longer be considered temporary." *Id.* at 39. At that point, a relationship more like adoption should be considered. *Id.* Representatives of the Goldstein-Freud-Solnit team joined in filing a brief as *amicus curiae* supporting the district court opinion that was overturned by the Supreme Court in *OFFER*.

162. *See* 431 U.S. at 846-47.

163. 431 U.S. at 845.

164. 431 U.S. at 846.

165. *See* notes 174-77 *infra* and accompanying text.

such as student roommates.¹⁶⁶

OFFER is a potentially significant case, because it arguably bears on defining the constitutionally protected "family" in ways that extend beyond marriage and kinship. The case has thus been construed as a takeoff point for considering "which attributes of the family are essential to the attainment of constitutional protection."¹⁶⁷ In that inquiry, some commentators think *OFFER* suggests that "of all the attributes of the family" (along with biological relationships, parent-child relationships, cohabitation, and formal commitment), "psychological support and involvement" is the most important element in determining the significance of a relationship for the individual.¹⁶⁸ Others pursuing that logic think "the question presented" in *OFFER* was "whether the presence of a psychological bond between foster parent and foster child creates a 'liberty interest' " requiring due process.¹⁶⁹ The assumption that *OFFER* lends theoretical support to a potential right of intimate association outside marriage and kinship was also encouraged by some of the language in Justice Brennan's majority opinion.¹⁷⁰ Support has also been inferred from the Goldstein-Freud-Solnit "psychological parent" theory¹⁷¹ on which the *OFFER* plaintiffs relied. One commentator on *OFFER* said this theory "rejects biology as the basis of the parent-child relationship and instead focuses on the daily transactions occurring between the child and the parent figure."¹⁷²

These interpretations are seriously flawed. The *OFFER* case does not suggest a "functional" analysis of human relationships, trying to identify whether a relationship should enjoy constitutional protection according to its psychological characteristics. Despite its superficial appeal to fairness based on individualized determinations, this approach overlooks the fundamental distinction between the emotional "weight" of an individual interest and the "nature" of the interest. Quoting a prior case, Justice Brennan wrote:

A weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due

166. 431 U.S. at 816 (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)).

167. *Developments, supra* note 10, at 1273.

168. *Id.* at 1283.

169. 46 TENN. L. REV. 671, 674 (1979).

170. "[B]iological relationships are not exclusive determination [sic] of the existence of a family," 431 U.S. at 843; "a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship," 431 U.S. at 844; "[t]he scope of [parental] rights extends beyond natural parents," 431 U.S. at 843 n.49; and "[t]he legal status of families has never been regarded as controlling," 431 U.S. at 845 n.53.

171. See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 39.

172. 46 TENN. L. REV. 761, 766 (1979).

process. But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake.¹⁷³

Justice Stewart's concurring opinion amplified this point, implying that the nature of the foster parents' interest was of a fundamentally different character from the nature of the interest of natural parents, because foster care laws provide "no basis for a justifiable expectation on the part of foster families that their relationship will continue indefinitely."¹⁷⁴ Foster care is, by design, "for a *planned* period — either temporary or extended."¹⁷⁵ Adoptive placement, on the other hand, "implies a *permanent* substitution of one home for another."¹⁷⁶ Thus, even though adoption is as much a state-created relationship as is foster placement, it "is recognized as the legal equivalent of biological parenthood."¹⁷⁷ In moving from foster care to adoption, the change in the parties' legally sanctioned expectations regarding the permanency of the relationship fundamentally alters the *nature* of their interest in the relationship, enough to raise it to the level of a constitutionally protected parent-child liberty interest. This is true regardless of the strength (or "weight") of the psychological ties in the relationship, despite the state's obvious but unenforceable hope for the development of nurturing ties.

This analysis of the nature of an interest or a relationship so significant that it warrants extraordinary constitutional protection is one of the Court's most important contributions to an understanding of the constitutional test that puts marriage, kinship, and adoption in a different category from other relationships.¹⁷⁸ The *relative permanence* of relationships arising from marriage, kinship, or adoption creates the "justifiable expectation . . . that their relationship will continue indefinitely,"¹⁷⁹ which gives such relationships a unique *nature* in terms of both human and legal expectations.¹⁸⁰

173. 431 U.S. at 841 (emphasis in original) (quoting Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972)).

174. 431 U.S. at 860 (Stewart, J., concurring in the judgment).

175. 431 U.S. at 824 (emphasis in original) (quoting A. KADUSHIN, CHILD WELFARE SERVICES 355 (1967)).

176. 431 U.S. at 825 (emphasis in original) (quoting A. KADUSHIN, CHILD WELFARE SERVICES 355 (1967)).

177. 431 U.S. at 844 n.51.

178. See Part III *infra*.

179. 431 U.S. at 860 (Stewart, J., concurring in the judgment).

180. Of course, even using permanency as the variable, there is among people living together an obviously wide spectrum of relationships, ranging from child-parent ties on one extreme to student roommates on the other. Today's divorce rates make clear that marriage is not likely to be as permanent as a child-parent relationship, especially since the child-parent tie usually survives divorce. Yet, as the Court recognized in Quilloin v. Walcott, 434 U.S. 246

Even though "psychological support and involvement" is among the most important elements to be hoped for in a family relationship, its subjective nature renders it the least susceptible of empirical verification and, therefore, the least satisfactory element for use by a court (or a society) in establishing meaningful standards.¹⁸¹ Parties to a relationship could never know what expectations, including psychological ones, are reasonable in a relationship that is intimate but otherwise undefined. Thus, for purposes of legal classification, it makes sense for the Court to rely on expectations of permanence in evaluating the "nature" of a relationship.

Those who see the search for a psychological bond as the key element in *OFFER* misunderstand the case.¹⁸² More accurately, *OFFER* asked whether an impermanent relationship created by the state for explicit child care purposes should establish a sufficient "liberty" interest to warrant a due process hearing once the relationship has existed for one year. The Court made no attempt to prove the existence in each foster family of a psychological bond as a precondition of recognizing the constitutional interest. The Goldstein-Freud-Solnit "psychological parent" theory is similarly misunderstood when it is thought to "rejec[t] biology as the basis of the parent-child relationship."¹⁸³ Those writers have clearly limited their attention to considerations relating to the psychological relationship between a child and an adult *only* when custody is already at issue because natural parent-child ties have already been disrupted. Their first choice would also favor child-parent ties established by birth or adoption, because "it is only through continuous nurture of the child within the privacy of the family" that primary psychological ties can be established.¹⁸⁴ Therefore, "[s]o long as a child is a member of a functioning family, his paramount interest lies in the preservation of his family."¹⁸⁵ With foster care, we are dealing again with "second choice" policy factors.

(1978), see text at notes 149-51 *supra*, the very nature of marriage justifies an expectation of greater permanence and more serious commitments than would be reasonably inferable from relationships between unmarried persons. This locates marriage toward the permanent end of the spectrum. Foster care relationships are somewhere in the middle, since state regulations make them less permanent than adoption but more permanent than a group of student roommates by virtue of the custodial obligations of foster parents, which continue until altered by the state.

181. See Part I D *supra*.

182. See note 169 *supra* and accompanying text.

183. See note 172 *supra*.

184. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 11 (1979).

185. *Id.* at 5.

A careful review of Justice Brennan's choice of language also supports, rather than weakens, the place of marriage, kinship, and adoption in legally defining the family. When Justice Brennan wrote that biology is not the only basis for a family, his example was marriage.¹⁸⁶ When he wrote that loving child-adult relationships exist without a blood tie, his example was adoption.¹⁸⁷ When he wrote that parental rights may extend beyond natural parents, his examples were the extended kinship family and legal guardians.¹⁸⁸ When he wrote that the legal status of a family is not controlling, his example was the kinship tie between the unwed parent and his or her child.¹⁸⁹ The Brennan opinion also described marriage as "[t]he basic foundation of the family in our society."¹⁹⁰

Marriage, by its legal nature, is to the adult male-female relationship what adoption is to the child-parent relationship. Both create a form of kinship. Both have in common the element of state-sanctioned permanence. The relationships in both cases may be legally changed by unforeseen contingencies, but the exalted level of constitutional protection given to each relationship arises directly from the presumption engaged in both by the parties and the state that there is both a "right" and an "expectancy" in "the continuity of the relationship." For this reason, "informal marriage" is a contradiction in terms. A relationship between unmarried adults may be characterized by the same deep emotional involvement that may arise in certain foster care relationships. But in both cases, until there is a quality of permanence, there is neither a marriage nor a family. A permanent quality can exist in a biological child-parent relationship outside marriage, both because of legal sanctions and because of the inherently permanent character of biological kinship — even for the nonvisiting divorced father. This permanence gives rise to constitutional protection of these relationships. There is, however, no biological equivalent to marriage; that may be one reason why the Court has never given constitutional protection to a relationship between unmarried adults. Absent a verifiable basis for presuming permanent commitments, neither the parties involved nor the state can reasonably assume enough about the nature of the relationship to warrant the personal investment or the full-blown legal protection necessary to sustain family relationships.

186. 431 U.S. at 843.

187. 431 U.S. at 844 & n.51.

188. 431 U.S. at 843 n.49.

189. 431 U.S. at 845 n.53.

190. 431 U.S. at 843.

Foster care has been around a long time. *OFFER* is a foster care policy case, not a case suggesting a new definition for the family. By noting that "a foster family . . . has its source in state law and contractual arrangements,"¹⁹¹ the Court correctly put the nature of the foster relationship where it belongs — as a matter of state policy.¹⁹²

D. *The Right To Marry Cases*

In marriage there is a profound overlapping of individual and societal interests of the most significant character. Society's interest in marriage appeared so obvious that Justice Holmes considered "some form of permanent association between the sexes" to be one of the rudimentary characteristics of civilization.¹⁹³ Lord Patrick Devlin considered the social interest so universal that "from time immemorial . . . in every society" marriage has been the subject of social regulation.¹⁹⁴ In one of its most recent opinions developing a constitutional "right to marry," the Supreme Court echoed these sentiments:

[M]arriage involves interests of basic importance in our society. . . . It is not surprising, then, that the States have seen fit to oversee many aspects of that institution. Without a prior judicial imprimatur, indi-

191. 431 U.S. at 845.

192. In foster care, the *state as parens patriae* is acting as a parent for a child whose family ties have been — temporarily, it is hoped — disrupted. In that role, the state has created and defined the nature of the foster parents' interest; without this action by the state, the foster parents in the case would have had no basis at all for their claim. The claim that a foster *child* — as distinguished from the foster parents — may deserve procedural due process protection before removal from a foster home is another issue, and was probably the basis for the hope among the foster parents group that constitutional recognition of the children's interest would force a change in foster care policies. The district court in *OFFER* decided on the basis of the children's rights, *Organization of Foster Families for Equality and Reform (OFFER) v. Dumpson*, 418 F. Supp. 277, 282 (S.D.N.Y. 1976), but the Supreme Court did not address the case in those terms. The Court did briefly mention the district court's theory, but rejected it on the ground that a foster child's removal, even if a "grievous loss," does not give rise to a protectable due process interest. 431 U.S. at 840-41.

The objective of those challenging the New York law was not to establish "psychological parenthood" as some kind of general alternative to biological parenthood; rather, their objective was to force a change in the prevailing assumptions governing foster care policies by stressing the importance of close emotional involvement in foster relationships lasting more than a year. Whether a state would wish to change its policy in that way is an important issue, but it is a child welfare policy problem, not a constitutionally loaded parents' rights issue. Even if the Court were to have found a "liberty" interest in the foster parents' role, that interest could only have been a procedural one. Foster parents have no true parental rights, not because the state has no authority to establish them (which it does constantly in adoption cases), but because the *natural parents'* permanent rights have not yet been terminated, as they are prior to an adoption.

193. Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

194. "Whether the union should be monogamous or polygamous, whether it should be dissoluble or not, and what obligations the spouses should undertake towards each other are not questions which any society has ever left to individuals to settle for themselves." P. DEVLIN, *THE ENFORCEMENT OF MORALS* 61 (1965).

viduals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval.¹⁹⁵

Established jurisprudence thus clearly recognizes the social — and legal — importance of marriage.

Despite such assumptions about society's interests, the individual liberty interest in marriage has emerged most forcefully in recent years. Building on what *Griswold v. Connecticut*¹⁹⁶ established about the constitutional sanctity of marriage,¹⁹⁷ *Loving v. Virginia*¹⁹⁸ struck down a state law forbidding interracial marriages. *Loving* was decided primarily on equal protection grounds in view of the classification based on race, but added the Court's first reference to "the freedom to marry" as a due process interest.¹⁹⁹ Anticipating the powerful legal implications of categorizing marriage as a fundamental civil right, one family scholar observed that *Loving* could well mean that "the functions of the family for the larger society and the need for marital restrictions are irrelevant. . . . It follows that what is done or how things are done in any particular family are matters of private and not public — or legal — concern."²⁰⁰ The next marriage case, *Boddie v. Connecticut*,²⁰¹ acknowledged the state's interest in regulating both marriage and divorce, but also established a procedural right of access to the divorce courts as a basic concomitant of the freedom to marry: one cannot legally marry *B* until becoming divorced from *A*. *Boddie* thus planted the seeds of a possible constitutional right to a divorce.²⁰²

195. *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (citations omitted). Justice Black added:

It is not by accident that marriage and divorce have always been considered to be under state control. The institution of marriage is of peculiar importance to the people of the States. It is within the States that they live and vote and rear their children The States provide for the stability of their social order, for the good morals of all their citizens, and for the needs of children from broken homes. The States, therefore, have particular interests in the kinds of laws regulating their citizens when they enter into, maintain, and dissolve marriages.

401 U.S. at 389 (Black, J., dissenting).

196. 381 U.S. 479 (1965).

197. 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.

381 U.S. at 486.

198. 388 U.S. 1 (1967).

199. 388 U.S. at 12 (Douglas, J., concurring).

200. B. FARBER, *supra* note 83, at 37.

201. 401 U.S. 371 (1971).

202. The right to a divorce is arguably inferable from the right to marry, even though the Court ruled in *Sosna v. Iowa*, 419 U.S. 393 (1975), using the rational basis test, that a dura-

The constitutional freedom to marry as a substantive fundamental right sprang full blown from the pen of Justice Marshall in *Zablocki v. Redhail* in 1978.²⁰³ *Zablocki* invalidated a state law prohibiting the marriage of persons having unpaid child support obligations. Marshall heavily loaded his opinion with individual liberty language, even though he noted the state's right to impose "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship"²⁰⁴ He spoke also of the right "to marry and raise" children "in a traditional family setting" as a corollary to the right to procreate, since the state controls legal procreation.

[I]f appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.¹¹

¹¹ Wisconsin punishes fornication as a criminal offense.²⁰⁵

This observation concerning the relationship between the right to marry and the right to procreate will warrant further inquiry in discussing the matter of sexual privacy.²⁰⁶

In attempting to fashion a test for evaluating the acceptability of state regulation of marriage, the Marshall opinion offers little guidance. Though he used fundamental rights terminology in an equal protection context, which would normally call for the highest scrutiny of legislation, he also stated that only those regulations that interfere "directly and substantially with the right to marry"²⁰⁷ would be subject to "rigorous scrutiny."²⁰⁸ Whether a compelling state interest test would then apply remained uncertain, though the application of Marshall's test to the *Zablocki* facts suggests a concern only with direct and substantial interferences. The potential for confusion in this framing of the constitutional theory caused considerable disturbance to Justices Stewart and Powell, who each concurred sep-

tional residency requirement for divorce does not unconstitutionally burden the right to travel. See notes 213-14 *infra* and accompanying text. On the other hand, of course, a constitutional right to divorce could completely negate society's interest in the preservation of existing marriages. A major point of this discussion of the right to marry cases (indeed an essential point of this Article) is that the social interest in marriage is extremely important in the constitutional scheme. In *Murrillo v. Bambrick*, 681 F.2d 898 (3d Cir.), *cert. denied*, 103 S. Ct. 378 (1982), the Third Circuit displayed skepticism over a fundamental right to divorce, although it assumed "arguendo" that such a right existed. 681 F.2d at 903 & n.9, 904.

203. 434 U.S. 374 (1978).

204. 434 U.S. at 386.

205. 434 U.S. at 386 & n.11.

206. See also note 334 *infra* and accompanying text.

207. 434 U.S. at 386.

208. 434 U.S. at 387.

arately, and to Justice Rehnquist, who dissented. All three seemed concerned that the majority opinion would undermine not only state regulation of marriage in a routine sense, but also the "importance of the marriage relationship to the maintenance of values essential to organized society."²⁰⁹ Some of the confusion created by *Zablocki* can be resolved by comparing it to *Califano v. Jobst*,²¹⁰ decided the same term. Marshall seemed to concentrate more on distinguishing *Zablocki* from *Jobst* than on defining the right to marry.²¹¹

The implications of classifying the right to marry on the extreme individual rights end of the spectrum of constitutional protections do not bode well for permitting careful analysis of the relationship between individual and social interests in this most basic of social institutions — unless, of course, the Court adopts a test that weighs those two interests as part of the process of determining whether a "liberty" interest is present in the first place.²¹² In the meantime, *Zablocki*'s rationale has already been applauded as providing individual protection not only against "a wide range of state laws limiting the right to marry," but also against laws "restricting other nonmarital forms of intimate association."²¹³ Taken still further, *Zablocki* can appear to limit the degree of social interest the state can express through its regulation not only of entering marriage, but also of leaving it. Under this reasoning, anything a state might do in its traditional role of defining the terms of entering and leaving the marital status may constitute an infringement on the terms on which one is married. Therefore, ultimately, any distinctions between the rights of married and unmarried persons — especially in their choice of how to associate intimately with other individuals — might be impermissible; the freedom to marry arguably implies the freedom not to marry.²¹⁴

209. 434 U.S. at 397 (Powell, J., concurring).

210. 434 U.S. 47 (1977).

211. In *Jobst*, a unanimous Court had upheld a provision of the Social Security Act which terminated the benefits of a disabled dependent child when the child married someone not covered by the Act. Although *Jobst* arguably involved the freedom to marry, the loss of benefits was held, under a minimal scrutiny test, to be an indirect hardship resulting from rational congressional assumptions about the effect of marriage on dependency. This differs from the *Zablocki* statute which totally prevented marriage by an indigent person who was subject to outstanding child support obligations. The *Jobst* statute only forced a choice between social security benefits and marriage. In addition, *Jobst* was simply a classification based on marital status, while *Zablocki* created an impervious obstacle to entering into marriage. This was the view of Justice Stevens in *Zablocki*. 434 U.S. at 403 (Stevens, J., concurring). Neither case involved the kind of serious state regulation of marriage that would call for a thorough analysis of society's interests in maintaining the marital institution.

212. This Article proposes such a test. See Part III *infra*.

213. Karst, *supra* note 11, at 671.

214. This is Professor Karst's position. For example:

Despite the individualistic overtones of the *Zablocki* majority, the "right to marry" cases do not disturb the hypothesis that constitutional protection of familial liberties is thus far reserved for interests involving blood, marriage, and adoption. In removing obstacles to marriage, the cases arguably advance the social interest in encouraging long-term commitments to the formal family. Their method of analysis nevertheless gives some cause for concern, primarily because it runs a serious risk of distorting the Court's historical recognition of both the social and the individual interests in marriage.

E. *The Children's Rights Cases*

I have discussed elsewhere²¹⁵ the historical justification for the concept of minority status and the recent children's rights movement which challenges that justification. A brief update is in order here, in part because these cases illustrate the Court's tendency to retreat over time from unnecessarily broad generalizations in its early cases affecting family relationships. The children's rights cases also reflect the Court's response to the current movement of individualistic egalitarianism, which would redefine the family as an assortment of isolated individuals rather than persons bound together by the bonds of kinship.

Most of the Court's children's rights cases have dealt with what might be termed "protection rights" rather than "choice rights" for minors. Protection rights include the right not to be imprisoned without due process, rights to property, and rights to physical protection. No minimum intellectual or other capacity is necessary to justify a claim to those rights. The legal doctrines developed for the benefit of children throughout the history of American jurisprudence, including the juvenile court movement, primarily fit this category. For example, *In re Gault*,²¹⁶ the Court's first significant

[E]asing exit from marriage may reduce the import of the act of marriage as an initial statement. But once the act of marriage recedes into the past, the freedom to leave gives added meaning to the decision to stay.⁷³

The freedom of nonassociation, it is often noted, is itself an associational freedom.

⁷³ . . . Should the wife, then, be able simply to walk away from her expressed commitment to her husband? The freedom of intimate association speaks to such questions not by offering answers, but by identifying them as questions of moral rather than legal obligation.

Id. at 638 & n.73 (footnote omitted). Karst's discussion of *Zablocki*, which does acknowledge that minimal age and incest restrictions may still be permissible in marriage regulation, applies *Zablocki*'s "substantive values" to unmarried relationships and concludes: "The extension of the freedom of intimate association beyond marriage to associations such as a couple's living together can be seen in a similar egalitarian light." *Id.* at 676.

215. Hafen, *supra* note 49.

216. 387 U.S. 1 (1967).

minors' rights case, found the careless procedures of an Arizona juvenile court to violate procedural due process not because the Court thought juveniles should always be treated as adults; rather, the Court held that minority status alone does not justify disregarding due process safeguards. Later cases made it clear that some of the characteristics of adult criminal trials are not suitable to the special protective needs of juveniles.²¹⁷

"Choice rights," on the other hand, represent the legal authority to make affirmative binding decisions of lasting consequence — marrying, contracting, exercising religious preferences, or seeking education. The right to vote, for instance, which may be the most fundamental of citizenship choice rights, has always been subject to an age limitation. The right to marry prior to statutory age limits is another basic choice right denied to minors.²¹⁸

The cases recognizing a choice right for minors are essentially limited to those dealing with abortion. *Tinker v. Des Moines School District*²¹⁹ might possibly be regarded as a choice rights case; it did acknowledge that public school students had enough of a first amendment right to wear armbands in protest against the government's Vietnam policy. However, both the childrearing and the free speech rights of the *Tinker* parents were arguably implicated in the case. Also, the Court had decided the year before *Tinker* that minors did not have first amendment rights equal to adults under obscenity laws.²²⁰

The teenage contraception case, *Carey v. Population Services International*,²²¹ granted minors the right to choose to prevent conception in the name of the right of privacy, which had been established as a minor's right the previous term in an abortion case.²²² However, the Court's primary concern in *Carey* was not really with granting teenagers a true "right of procreation;" rather, the justices simply did not believe that denying access to contraceptives would reduce the incidence of premarital sexual activity. Their real fear was that de-

217. *E.g.*, *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (right to jury trial would not aid juvenile court's factfinding function and might impair need for flexibility and confidentiality).

218. The right to marry before the age of majority was distinguished from the right to obtain an abortion before majority in *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622, 642 (1979) (plurality opinion).

219. 393 U.S. 503 (1969).

220. *Ginsberg v. New York*, 390 U.S. 629 (1968) ("I think a State may permissibly determine that . . . a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." 390 U.S. at 649-50 (Stewart, J., concurring in the judgment)).

221. 431 U.S. 678 (1977).

222. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

nial of access to contraceptives would seriously aggravate the problems of "unwanted pregnancy and venereal disease."²²³ They sought to protect minors against such damaging risks.²²⁴ The absence of any attention in *Carey* to the issue of maturity, which has become a major factor in determining which pregnant minors are entitled to make their own choice about having an abortion,²²⁵ confirms the interpretation of *Carey* as a protection rights case.

An important relationship exists between the protection-choice distinction and the concept of minority status. The denial of choice rights during minority is a form of protection against a minor's own immaturity and vulnerability to exploitation by those having no responsibility for the child's welfare. The conferring of the full range of choice rights — essentially, adult legal status — requires a dissolution of the protection rights of childhood. One cannot have the freedom to live where and as one chooses and still demand parental support; one may not deliberately enter into contracts and yet insist that they be voidable. The lifelong effects of binding, childish choices can cause permanent damage far more detrimental than the temporary limitations on personal freedom inherent in minority status. To be protected against that risk requires a restriction on the range of choice rights.

In some of its early cases, the Court spoke in language broad enough to create the impression that all of the rights of minors should be regarded as "coextensive with those of adults,"²²⁶ and that "children are autonomous individuals, entitled to the same rights and privileges before the law as adults."²²⁷ When the Court rendered its first opinion involving a confrontation between the alleged constitutional rights of parents and the constitutional rights of their minor child, Justice Blackmun tossed off the Court's first, confusing mention of a "right of privacy" for minors as if it deserved no com-

223. 431 U.S. at 715 (Stevens, J., concurring in part).

224. *Carey* is a classic case of deregulation — in this instance given constitutional recognition — to avoid harming kids in the name of helping them. . . .

. . . . The sexually active 15-year-old is given access to birth control not out of recognition of his or her mature judgment. Indeed, the *less* equipped a particular individual is for the burdens of parenthood, the stronger the argument against denying access to contraception when we cannot deny access to sex. . . . The civil right being vindicated is the right not to be gratuitously harmed.

F. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 62-63 (1982).

225. See notes 235-39 *infra*.

226. *State v. Koome*, 84 Wash. 2d 901, 904, 530 P.2d 260, 263 (1975).

227. Brief for State Respondent at 23, *In re Snyder*, 85 Wash. 2d 182, 532 P.2d 278 (1975), discussed in Hafen, *supra* note 49, at 609.

ment, let alone an explanation.²²⁸

In the next child's rights vs. parents' rights case, however, Justice Powell wrote the most comprehensive statement the Court has yet provided on the difference between the constitutional status of minors and adults. In *Bellotti v. Baird (Bellotti II)*,²²⁹ Powell stated that "the peculiar vulnerability of children[,] their inability to make critical decisions in an informed, mature manner[,] and the importance of the parental role in child rearing" together justified "the conclusion that the constitutional rights of children cannot be equated with those of adults . . ."²³⁰ Powell's opinion also shed some light on the question whether the children's rights cases should be read as assimilating children into the tradition of individual liberty, thereby removing them from the family tradition which historically placed parents between children and the state:²³¹

Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.²³²

This analysis, together with the limited range of choice rights conferred in the Court's cases to date, supports traditional assumptions about the child-parent relationship. Supervision of the choice rights of minors lies at the very heart of the custodial rights of parenthood, and forms the rationale for minority status. Without that supervisory role, serious doubt would have been cast on the primary role of value transmission ascribed by our culture to parents. The Court has also buttressed the parental role in a series of parents' rights cases that are summarized elsewhere.²³³

Giving constitutional protection to the right of minors to obtain abortions without parental consent has become the major exception to the Court's overall posture toward granting choice rights to minors. The Court's willingness to make this exception seems attribu-

228. *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976) ("Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.").

229. 443 U.S. 622 (1979).

230. 443 U.S. at 634 (plurality opinion).

231. The individual tradition and the family tradition are compared in Hafen, *supra* note 49.

232. 443 U.S. at 638-39.

233. Hafen, *supra* note 49, at 613-29; *see also* *Parham v. J.R.*, 442 U.S. 584 (1979). For a helpful perspective on the value of adapting legal reasoning to the peculiar needs of adolescents, including their need for parental guidance, *see generally* F. ZIMRING, *supra* note 224.

table to two factors. First, Justice Powell described the abortion decision for a plurality of the Court in *Bellotti II* as being in a class by itself. He never once used the term "right of privacy," preferring instead the very specific "constitutional right to seek an abortion." Abortion differs "in important ways from other decisions that may be made during minority."²³⁴ Abortions for minors are made unique primarily because the pregnant minor is herself a prospective parent, which pits her own inchoate parental right against the parental rights of her parents. If she completes her pregnancy, she will then be a mother having full responsibility for her child. Her parents will legally have nothing to say about her decision to place the child for adoption or to keep it. If she were carrying a tumor rather than a child, well established common law rules — with or without a parental consent statute — would require parental consent as a condition of surgery. The decision to abort a child is fundamentally different. Moreover, forcing the creation of an unwanted family undermines the reasons we value family ties in the first instance. Thus, the minors' abortion cases actually contribute toward an interpretation of either due process "liberty" or "privacy" that is narrowly limited to childrearing decisions.

Second, the court has also been influenced by its development of a "mature minor" rule in the abortion context, which restricts the class of minors who may make an unrestricted choice about abortion to those found "mature" by a judge. Reliance on individualized determinations of maturity departs from an entire system of age-based classifications in the laws relating to minors.²³⁵ The Court may have been influenced by the now discredited doctrine of irrebuttable presumptions,²³⁶ or it may have taken with unwarranted seriousness the erroneous claim of one of the attorneys in *Bellotti v. Baird (Bellotti J)*²³⁷ that there is a recognized "mature minor" exception to the common law doctrine requiring parental consent as a condition to medical treatment of minors.²³⁸ Whatever the Court's reasoning, de-

234. 443 U.S. at 642.

235. In "all state legislation seeking to protect minors from the consequences of decisions they are not yet prepared to make . . . chronological age has been the basis for imposition of a restraint on the minor's freedom of choice even though it is perfectly obvious that such a yardstick is imprecise and perhaps even unjust in particular cases." *Planned Parenthood v. Danforth*, 428 U.S. 52, 104-05 (Stevens, J., dissenting in part).

236. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Vlandis v. Kline*, 412 U.S. 441 (1973); G. GUNTHER, *CONSTITUTIONAL LAW* 970 (10th ed. 1980).

237. 428 U.S. 132, 144 (1976).

238. The sources cited in the brief of the Massachusetts Attorney General discuss circumstances permitting a court to waive the normal requirement of parental consent to medical treatment, but the circumstances are limited to an "emergency" exception, a parental conflict of interest exception, and parental unwillingness to consent when therapeutic abortion is nec-

terminations of maturity are hopelessly subjective, which means that a judge — rather than a minor or her parents — is the real decisionmaker. This is especially true under Justice Powell's approach, which would have a judge first determine maturity, then, if the minor is deemed immature, decide if the abortion serves her best interests.

The court's inclination toward subjective, case-by-case determinations has also shown up in the unwed fathers cases and the illegitimacy cases, where Justice Powell has again taken the lead. He has seemed unusually preoccupied with wanting the Court to draw unmanageable numbers of minute factual distinctions. Giving him, and the Court, the benefit of the doubt, their determination to encourage individualized determinations must stem from a desire to be supremely fair — and perhaps from a desire to seek for compromise grounds in difficult cases. The family law context is a tantalizingly inviting scene for a judge bent on individualized assessments of fairness, for no matter whether the rules are described in constitutional or other terms, the rules will often have less to say about the outcome than the weighing of each factual circumstance. What such a legal environment calls for, of course, is not a system of laws, but a king — or a weatherbeaten domestic relations judge.²³⁹

The Court has generally left the concept of minority status — and even the notion of state support for parental authority — in its traditional place, except, for unique reasons, in the abortion cases. Nonetheless, some, including the chairman of the ABA's Section on Individual Rights and Responsibilities, would "liberate" children from the "captivity" of the family tradition. He has proposed "that we consider the logical and ultimate step — that all legal distinctions

essary. See Baron, Botsford & Cole, *Live Organ and Tissue Transplants from Minor Donors in Massachusetts*, 55 B.U. L. REV. 159, 166 (1975); Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115, 116, 121-22 (1973); see also *Ballard v. Anderson*, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971). In fact, there is no "mature minor rule" in common law cases. The RESTATEMENT OF TORTS, § 59 comment a, at 111 (1934), advanced the idea of a subjective standard of competence in considering the legal sufficiency of consent to intentional invasions of personal interest. The widespread rejection of this approach led to the adoption of an objective age limit standard in the RESTATEMENT (SECOND) OF TORTS, §§ 59, 892A(2) comment b (1977). On the general subject of exceptions to parental consent requirements, see R. MNOOKIN, *CHILD, FAMILY AND STATE* 350-79 (1978), which summarizes other statutory exceptions where parental consent is not required for treatment of such problems as venereal disease and drug abuse. The interest of the state in facilitating needed care in these exceptional cases is obviously undermined when minors are deterred from obtaining treatment by fear of disclosure to parents when seeking consent to treatment. This interest may also be involved when therapeutic abortions are necessary, but not in other abortions.

239. On the general issue of marriage and minority status as sources of objective jurisprudence, see Part I D *supra*.

between children and adults be abolished."²⁴⁰ Others have issued similar calls, perhaps drawing support from reading more than is warranted into the Court's children's rights cases.²⁴¹ The Court's decisions, however, fall a good deal short of supporting such a dismantling of our assumptions about the purposes of family life and minority status. The Court is willing to employ constitutional doctrines to extend protection to minors for the reasons the law has always given them special protection — indeed, discriminating in their favor. Beyond that, the choice rights cases have developed in a limited way that recognizes some liberty interests peculiarly related to parenthood and childbearing, but not a general right of autonomy for minors.

F. *The Broad Right of Privacy — The Intimate Association and Free Expression Cases*

This line of cases originally hinted that a wide-ranging right of personal privacy might emerge under the heading of the first amendment's interest in association and expression. As the Court has responded to a variety of claims over the years, however, no such right has developed.

In the 1965 case of *Griswold v. Connecticut*,²⁴² the Court invalidated a state law regulating the use of contraceptives by married couples. *Griswold* thus became a leading case both in developing a constitutional right to marry and in developing constitutional protection for decisions related to childbearing. In addition, Justice Douglas seized the *Griswold* opportunity to introduce his unique theory of privacy, grounded not in the text of the Constitution, but in the "penumbras" emanating from a variety of explicitly guaranteed rights. Douglas' biographer described his *Griswold* opinion as "one of the most important constitutional decisions of the twentieth century," because the right of privacy identifies "the most critical constitutional battleground for human dignity in the modern age."²⁴³ Douglas' concurring opinion in *Roe v. Wade*²⁴⁴ revealed the breadth of his view of privacy. In *Roe*, he wrote with sweeping strokes of

240. Manahan, *Editorial: Children's Lib*, 3 A.B.A. Sec. on Indiv. Rts. & Resps. (Spring 1976).

241. Some of this literature is summarized in Hafen, *supra* note 49, at 631-32.

242. 381 U.S. 479 (1965).

243. J. SIMON, *INDEPENDENT JOURNEY* 348-49 (1980). Douglas began developing his view of privacy as early as 1952. "His belief in the right to be let alone, nowhere expressly guaranteed in the Constitution, became . . . the overriding theme of Douglas's libertarian philosophy and represented his most significant contribution to constitutional law." *Id.* at 346.

244. 410 U.S. 113 (1973).

“the Blessings of Liberty,” which included “autonomous control over the development and expression of one’s intellect, interests, tastes, and personality,” as absolute first amendment rights.²⁴⁵ The philosophical premises for this view are very simple — every person has a capacity for autonomy and the right to equal concern and respect in pursuit of his autonomy.²⁴⁶ Within a constitutional framework, these premises lead to the “most comprehensive of rights and the right most valued by civilized men”: the right to be let alone.²⁴⁷ The right of privacy has been a confusing, but lively, subject of debate since the day it was born in 1965.²⁴⁸ Whether it has developed since then as a dwarf, totally changed its form, or died of malnutrition remains unclear, though the number of post-*Griswold* cases does allow a better perspective now than was possible a few years ago.

In *Stanley v. Georgia*,²⁴⁹ the Court overturned a criminal conviction for possession of obscene films on the ground that the possession of admittedly obscene material in one’s own home is protected by the first amendment, with supporting protection from *Griswold*’s right of privacy. The *Stanley* Court’s rejection of state attempts to “control the moral content of a person’s thoughts”²⁵⁰ seemed to question the basis for any obscenity and other morals legislation affecting only consenting adults. However, later cases narrowed *Stanley* by strictly limiting the right to acquire obscene materials outside the home.²⁵¹ *Paris Adult Theatre I v. Slaton*,²⁵² which refused to protect a theatre owner who showed obscene movies to consenting adults, also substantially curtailed *Stanley*’s general freedom of expression overtones.²⁵³

245. 410 U.S. at 210-22 (Douglas, J., concurring).

246. See Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 8, 34 n.160 (1980).

247. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 974 (1979). The “right to be let alone” comes from Justice Brandeis’ dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), a fourth amendment search and seizure case. See also R. Dworkin, *Taking Rights Seriously*, in *IS LAW DEAD?* 168 (E. Rostow ed. 1971).

248. For an analysis of the *Griswold* opinions, see Note, *supra* note 32, at 673-86.

249. 394 U.S. 557 (1969).

250. 394 U.S. at 565.

251. See, e.g., *United States v. Reidel*, 402 U.S. 351 (1971).

252. 413 U.S. 49 (1973).

253. “If obscene material unprotected by the First Amendment in itself carried with it a ‘penumbra’ of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the ‘privacy of the home,’ which was hardly more than a reaffirmation that ‘a man’s home is his castle.’” 413 U.S. at 66. Even the privacy of “the home” had previously been questioned in a fourth amendment context, since that amendment “protects people, not places.” *Katz v. United States*, 389 U.S. 347, 351-52 (1967). In addition, Justice Harlan made this telling distinction between “home” and “family”: “Certainly the

Chief Justice Burger's majority opinion in *Paris* strongly repudiated the premise from which much of the reasoning about individual autonomy²⁵⁴ and free expression of lifestyle preferences proceeds: namely, John Stuart Mill's libertarian principle that "the only purpose for which power can be rightfully exercised over any member of a civilized community . . . is to prevent harm to others."²⁵⁵ Mill's position would require proof of actual harm before restrictions on personal autonomy would be allowed. But the Court, responding to the theatre owner's argument that "there are no specific data which conclusively demonstrate that exposure to obscene material adversely affects men or women or their society,"²⁵⁶ vigorously upheld the right of legislatures to act on "various unprovable assumptions"²⁵⁷ in concluding that public exhibition of obscenity "has a tendency to injure the community as a whole."²⁵⁸ In other words, in regulating obscenity (and in other morals legislation), the state may presume the existence of harm in the absence of verifiable evidence. This view is very similar to the position taken by Lord Devlin in the famous debates arising over homosexuality in England.²⁵⁹

The question of where to place the burden of proof is the key legal issue in cases involving regulations such as those that deal with obscenity and sexual relations between consenting adults, because unequivocal proof of either the presence or absence of individual or social harm is so difficult to adduce.²⁶⁰ In the *Paris* case, as in its sexual privacy cases,²⁶¹ the Supreme Court left that burden on those challenging traditional norms.

The cases dealing with contraceptives for single persons and

safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life." *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting).

254. Justice Brennan's dissent in *Paris* toyed with the idea of advancing *Stanley*, along with *Griswold*, as authority for the proposition that obscenity should be available to consenting adults on the basis of a general individual autonomy principle. He rejected this approach in favor of the "narrower basis" that obscenity is incapable of definition "with sufficient clarity to withstand attack on vagueness grounds." 413 U.S. 49, 85-86 n.9 (Brennan, J., dissenting).

255. J. MILL, ON LIBERTY ch. 1 (London 1859), reprinted in J. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 8 (R. McCallum ed. 1946). "[S]urely the United States Constitution no more enacts *On Liberty* than it enacts Mr. Herbert Spencer's Social Statics." Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U. L. REV. 417, 434 (1976).

256. 413 U.S. at 60.

257. 413 U.S. at 61.

258. 413 U.S. at 69.

259. See generally Reynolds, *The Enforcement of Morals and the Rule of the Law*, 11 GA. L. REV. 1325, 1329 (1977).

260. See notes 418-22 *infra* and accompanying text.

261. For a more detailed discussion of the sexual privacy cases, see Part II H *infra*.

abortions are treated separately,²⁶² but deserve some mention here; these cases use the term "right of privacy," but restrict its meaning to decisions regarding childbearing. *Roe v. Wade*,²⁶³ for example, located the privacy right within the meaning of due process "liberty," which implicitly rejected the broad Douglas view in favor of Justice Harlan's narrower approach to *Griswold*.²⁶⁴ Moreover, the *Roe* majority directly repudiated an "unlimited right" of privacy that would allow one "to do with one's body as one pleases."²⁶⁵

The Court has consistently refused in recent cases to accept broadly based lifestyle and autonomy arguments, confirming Justice Blackmun's observation in *Roe* that, "The Court has refused to recognize an unlimited right of this kind"²⁶⁶ The Court has twice upheld state sodomy statutes against vagueness challenges.²⁶⁷ In 1976, the Court summarily affirmed a federal district court's ruling that upheld the constitutionality of a state sodomy statute as it applied to consenting adult male homosexuals.²⁶⁸ Two years later, the Court declined to review another district court decision allowing the discharge of two employees of a public library for "living together in a state of 'open adultery.'"²⁶⁹ In these two summary actions, the Court acted despite vocal dissents. Justice Marshall's dissent in both cases echoed Justice Douglas' earlier choice-of-lifestyle theme as a matter of both personal privacy and intimate association.

Cases in other contexts reflect the same pattern. One case rejected the argument that the "liberty" interest of the privacy cases protected a policeman's right to challenge a local hair length regulation.²⁷⁰ Another case rejected the federal civil rights claim of a newspaper photographer whose name and photograph were included in a police flyer listing active shoplifters.²⁷¹ The photographer argued that his interest in reputation was protected by his right

262. See Part II G *infra*.

263. 410 U.S. 113 (1973).

264. See *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting). That may be one reason Justice Douglas felt obliged to enter the concurring opinion in *Roe* that contained his wide-ranging view of privacy.

265. 410 U.S. at 154.

266. 410 U.S. at 154.

267. *Wainwright v. Stone*, 414 U.S. 21 (1973); *Rose v. Locke*, 423 U.S. 48 (1975). In *Rose*, the Court indicated that no fundamental right was involved in the case. 423 U.S. at 50 n.3.

268. *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), *affg. mem.* 403 F. Supp. 1199 (E.D. Va. 1975).

269. *Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052 (1978), *denying cert. to* 578 F.2d 1374 (3d Cir. 1978).

270. *Kelley v. Johnson*, 425 U.S. 238 (1976).

271. *Paul v. Davis*, 424 U.S. 693, 701 (1976).

to privacy and liberty. Justice Rehnquist's majority opinion expressed concern about those who want to read the fourteenth amendment as "a font of tort law to be superimposed" on existing legal remedies.²⁷² In *Whalen v. Roe*,²⁷³ a group of patients and physicians unsuccessfully invoked the privacy right in attacking a state law creating a computer file listing the names and addresses of patients who obtained certain prescription drugs. Writing for a unanimous Court, Justice Stevens placed the Court's prior privacy cases into three categories: (1) freedom from government surveillance as protected by the fourth amendment; (2) the interest in avoiding public disclosure of personal matters; and (3) the interest in making independent personal decisions in matters relating to marriage, procreation, and childrearing.²⁷⁴ He also confirmed that the Court in *Roe*, "after carefully reviewing" the prior privacy cases, had determined to recognize the right of privacy as part of due process liberty rather than as "an independent source of constitutional protection" in the "shadows" or "penumbras" of the Bill of Rights.²⁷⁵ The thrust of this language and the recent cases is that no *general* right of privacy exists, and such privacy interests as do exist must meet the standards for inclusion within the meaning of due process liberty. The omission of any reference to an interest in sexual or lifestyle preferences in these categories was both conspicuous and significant. The Court has had numerous opportunities by now to give constitutional protection to that interest, but has refused to do so.

In the related area of associational privacy, the Court has followed a similar pattern of appearing to start on a broad base, then narrowing its position over time. In *United States Department of Agriculture v. Moreno*,²⁷⁶ the Court struck down an amendment to the federal food stamp program that excluded from the program's coverage households containing any person who was unrelated to another household member. The plaintiffs in the case were three different indigent households, each of which consisted of a family plus one unrelated individual who lived with the family for various commonplace reasons. The Court saw no rational connection between the household exclusion provision and the law's purpose in alleviating hunger among the poverty class. Justice Douglas, concurring, thought the case implicated associational rights protected by the first

272. *Paul v. Davis*, 424 U.S. 693, 701 (1976).

273. 429 U.S. 589 (1977).

274. 429 U.S. at 599-90 & nn.24-26.

275. 429 U.S. at 598 n.23.

276. 413 U.S. 528 (1973).

amendment.²⁷⁷ The Court's use of the rational basis test and the nature of the households involved²⁷⁸ made it doubtful that *Moreno* intended to extend the concept of familial privacy to associations of unrelated persons. In fact, the statute interfered with family privacy, because of its effect on families who merely invited another single person to share their home. *Moreno* also reflected an underlying desire to aid economically disadvantaged classes — a concern that could well have motivated the Court in such other cases as *Roe*, *Boddie v. Connecticut*,²⁷⁹ and *Zablocki v. Redhail*.²⁸⁰

A year later, Justice Douglas had nothing to say about associational rights in writing the majority opinion in *Village of Belle Terre v. Boraas*.²⁸¹ In *Belle Terre*, six college students unsuccessfully challenged the definition of "family" in a single-family dwelling ordinance. Justice Brennan later described the *Belle Terre* plaintiffs as "a mere collection of unrelated individuals" whose ties did not rise to the level of the temporary relationships in a foster family.²⁸² In dissent, Justice Marshall thought the ordinance violated the rights of associational freedom and privacy.²⁸³ Some factual distinctions between *Moreno* and *Belle Terre* may explain the difference in outcome between the two cases,²⁸⁴ but more important than the differences may be what the cases have in common: neither was considered by the Court as an associational freedom or right of pri-

277. 413 U.S. at 543 (Douglas, J., concurring).

278. None of the households involved intimate relationships. One of the unrelated persons was a "20-year-old girl" taken in by a couple and their three children because they "felt she had emotional problems." 413 U.S. at 532. Another involved a mother sharing an apartment with another woman in order to live in a more expensive area of town near a special school for her deaf daughter. 413 U.S. at 532. A third case involved an older diabetic woman who lived with a mother and three children. The mother helped care for the woman and shared expenses with her. 413 U.S. at 531.

279. 401 U.S. 371 (1971).

280. 434 U.S. 374 (1978).

281. 416 U.S. 1 (1974).

282. *Smith v. Organization of Foster Families for Equality and Reform (OFFER)*, 431 U.S. 816, 844-45 (1977).

283. "The choice of household companions . . . involves deeply personal considerations as to the kind and quality of intimate relationships within the home." 416 U.S. at 16 (Marshall, J., dissenting).

284. Justice Douglas distinguished the cases by saying that in *Moreno*, "a household containing anyone unrelated to the rest was denied food stamps." 416 U.S. at 8 n.6. That is a less than comprehensive distinction, except as it reflects on the seriousness of the economic loss. The economic factor is also noted in the *Moreno* Court's comment that the food stamp law excluded "only those . . . so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain eligibility." 413 U.S. at 538 (Douglas, J., concurring) (emphasis in original). Presumably, the students in *Belle Terre* would have found it easier to relocate. Further, the inherently transient nature of the *Belle Terre* students may have been a factor, as theirs was not an "enduring relationship," L. TRIBE, *supra* note 91, at 990 n.30, or perhaps not really a "home."

vacy case justifying heightened scrutiny of the legislation. Some of the commentary about *Belle Terre* has nevertheless assumed the presence of significant associational interests.²⁸⁵

The Court's most recent household zoning case, *Moore v. City of East Cleveland*,²⁸⁶ drew a very sharp distinction between unrelated persons and persons related by kinship. In *Moore*, the Court invalidated a single-family dwelling ordinance drawn in a way that excluded from its definition of "family" a household consisting of a grandmother, her son, his son, and another grandson. In the most explicit recognition of substantive due process the Court has undertaken in its modern cases, Justice Powell's plurality opinion relied on a "tradition" test to find that due process liberty protects extended family ties.²⁸⁷ Justice Powell ignored doctrines concerning intimate association and individual expression protected by the first amendment or the "penumbras" of other explicit guarantees. Instead, he traced the chain of title giving preferred recognition to family relationships back to *Meyer v. Nebraska*²⁸⁸ and *Pierce v. Society of Sisters*.²⁸⁹ These were the earliest cases establishing the constitutional right of parents to direct the education of their children. Because of this long lineage in a tradition of preference for family values, Powell described the place of family relationships in the world of substantive due process as simply outlasting the post-*Lochner* decline in cases involving economic interests.²⁹⁰ This perspective places *Griswold* in the chronological middle of an established substantive due process tradition based on the liberty interest inherent in marriage and kinship, rather than seeing *Griswold* as the beginning of a stirring new privacy philosophy laden with first amendment overtones.²⁹¹

The dissenters in *Moore* further underscored the absence of a constitutional principle that would justify protection for intimate associations without family ties. Justice Stewart wrote that the first amendment's freedom of association was designed to protect such "ideological freedom" as "the promotion of speech, assembly, the press, or religion." It was never intended to protect associations based on "no interest other than the gratification, convenience, and

285. *E.g.*, L. TRIBE, *supra* note 91, at 974-90.

286. 431 U.S. 494 (1977).

287. 431 U.S. at 504 (plurality opinion).

288. 262 U.S. 390 (1923).

289. 268 U.S. 510 (1925).

290. 431 U.S. at 502-03.

291. 431 U.S. at 503 n.11.

economy of sharing the same residence.”²⁹² Stewart found Mrs. Moore “closer to the constitutional mark” in seeking protection within the realm of family life, but disagreed with the plurality that the interest in sharing the same home with blood relatives was a significant enough family interest to invoke the guarantees given to decisions about childrearing.²⁹³

The absence of decisions developing the broad overtones of the Douglas right of privacy, whether in freedom of association, expression, or personal autonomy, makes it clear that contemporary attempts to link unconventional lifestyle preferences and associations to the family liberty cases are misplaced. Justice Marshall’s lonely dissents in the recent cases, which seek to include a range of self-expression and associational interests outside the family circle, have remained both lonely and dissenting because his views require doctrinal support beyond traditional due process liberty and such support has simply not developed.

Laurence Tribe is disturbed that the Court has not recognized associational freedoms among unrelated persons.²⁹⁴ He foresees a coming liberation by the State of “the child — and the adult — from the shackles of such intermediate groups as family.” Being “liberated from domination by those closest to them” raises an urgent need for legal recognition of alternative relationships that “meet the human need for closeness, trust, and love” in the midst of “cultural disintegration and social transformation.”²⁹⁵ Others express similar concerns.²⁹⁶ Their disappointment seems to stem primarily from their conviction that a broadly based right of individual autonomy is the core value of the Constitution, a value which the Court has failed to accept, let alone build upon. Still they write, hopefully, as if constitutional principles already in place make inevitable the ultimate movement of autonomy to the center of the constitutional stage.

There are serious problems inherent in making autonomy the

292. 431 U.S. at 535-36 (Stewart, J., dissenting).

293. 431 U.S. at 536-37 (Stewart, J., dissenting). Stewart’s view was shared by Justice Rehnquist and, in a separate dissent, by Justice White. 431 U.S. at 549 (White, J., dissenting).

294. L. TRIBE, *supra* note 91, at 974-80, 987-90.

295. *Id.* at 988-89. There has indeed been a gradual loosening of family bonds over the recent historical period, not because the “State” has consciously sought to “liberate” family members from one another, but because of far-reaching cultural and economic developments. Through this process “the rise in importance of status and security of an individual’s own work and government-derived benefits, relative to traditional forms of property and relative to family relationships” have acted as “a powerful solvent of the legal bonding that once formed part of the cultural reinforcement of [family] relationships. . . .” M. GLENDON, *supra* note 77, at 139.

296. *E.g.*, Karst, *supra* note 11; Richards, *supra* note 246.

core constitutional value, whether in the name of "privacy" or in some other way. The Court has sensed these problems, though its opinions may not yet have articulated a comprehensive response. For one thing, an unenumerated right as expansive as the "Blessings of Liberty" in the Preamble to the Constitution²⁹⁷ is so broad that nearly any phase of human conduct can logically claim to be within its protective scope.²⁹⁸ If the Court had really adopted the Douglas view of privacy, the Bill of Rights might well have become redundant. Even advocates of an expanded right of privacy recognize that if the right "is to be a viable doctrine, there must be limits to its application" ²⁹⁹ Without understandable limits, privacy simply becomes "the harbinger of another *Lochner* era."³⁰⁰ Moreover, true autonomy as a guiding principle is simply unrealistic about the need for law in an organized society. As Justice Holmes put it, "pretty much all law consists in forbidding men to do some things that they want to do" ³⁰¹

More seriously and perhaps less obviously, the very term "privacy" as a description for substantive rights is an unfortunate source of confusion. The real source of this society's concern with the protection of personal privacy has been the explosion of electronic-age methodology that creates the capability of massive physical and psychological intrusion and surveillance.³⁰² This latest scientific revolution has come pouring in on a mega-society already quaking from deep-seated fears of everything from the Bomb to existential alienation. The political implications of this electronic revolution exacerbate our fears. We know all too well that "surveillance over privacy is a functional necessity for totalitarian systems" ³⁰³ Thus we yearn for an environment that "ensures strong citadels of individual and group privacy and limits both disclosure and surveillance," for "the democratic society relies on publicity as a control over govern-

297. See notes 244-45 *supra* and accompanying text.

298. Professor Schauer has found a similar problem when First Amendment "speech" is viewed so broadly that it encompasses every other form of individual expression in addition to speech, from choice of hair length to choice of automobile. "A theory that does not functionally distinguish speech from this vast range of other conduct reduces free speech to a general principle of liberty," which is "little more than a platitude." Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 912-13 (1979).

299. Note, *supra* note 32, at 673.

300. *Id.* at 773.

301. *Adkins v. Children's Hosp.*, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting).

302. See generally A. WESTIN, *PRIVACY AND FREEDOM* (1967).

303. *Id.* at 24.

ment, and on privacy as a shield for group and individual life."³⁰⁴ With such a pervasive foundation, it is no wonder that a *constitutional right of Privacy* could be perceived to touch so many interests, especially those that seem, well, private.

Even though "privacy" would normally convey a concern with intrusive *methods* that let the State make anything very personal into its business, it has been all too easy to transfer the procedural fear into a substantive one. As a result, a number of lower court judges attempting to apply the privacy right in a variety of circumstances have begun their constitutional analysis by assessing the justification for state interest in regulating private behavior, regardless of the nature of the behavior and whether it deserves extraordinary protection. If it is private conduct, they assume, the state carries the burden of justifying its interest.³⁰⁵ The difficulty with this approach, of course, is that criminal activity, for instance, flourishes in privacy just as does the most sacred and intimate personal activity.³⁰⁶ That an activity may be carried on in private tells us nothing about the nature of the activity, let alone whether it is of such a nature that substantive constitutional interests are implicated.

It has been accurately noted that "what the Court has been talking about is not at all what most people mean by privacy."³⁰⁷ Except for the fourth amendment cases, the Court has looked not for official *intrusion*, but for certain kinds of official *regulation*. "Liberty" would have been a far better term than "privacy" to describe freedom from regulation, both because "privacy" had already taken on a secondary meaning in the context of surveillance and intrusion, and because "liberty" already had an established meaning as a legal term

304. *Id.*

305. One study of lower court privacy opinions found that "virtually all" of the judges who believed the right of privacy should protect the right of all adults to engage in private, consensual sexual behavior "focused on what they viewed as the state's lack of interest in preventing private sexual behavior, rather than on the nature of the activity involved. The state's interest, or lack of interest, should not compel any conclusions about whether or not an affirmative constitutional right is at stake." Note, *supra* note 32, at 724. The dissenting opinion at the district court level in *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1203 (W.D. Va. 1975) (Merhige, J., dissenting), for example, took *Griswold* and *Roe v. Wade* to stand "for the principle that every individual has a right to be free from unwarranted governmental intrusion into one's decisions on private matters of intimate concern." 403 F. Supp. at 1203 (Merhige, J., dissenting). Because this beginning premise shifted the burden of proving social harm to the state, the judge concluded that "[p]rivate consensual sex acts between adults are matters, absent evidence that they are harmful, in which the state has no legitimate interest." 403 F. Supp. at 1203 (Merhige, J., dissenting) (footnote omitted).

306. "[S]exual relations, to be sure, are usually conducted 'in private,' even today; but other activities are also generally secreted, done 'in private,' from burglary to espionage and conspiracies to overthrow governments." Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1429 (1974).

307. *Id.* at 1424.

of art within the historical context of the due process clause. As it turns out, ever since *Roe* the "privacy" cases really belong within the framework of substantive due process liberty. If the scaffolding of "privacy" was necessary to erect a structure of "liberty," the scaffolding should now be removed. Perhaps Justice Douglas intentionally wanted to fashion a right of privacy in which the boundaries of the substantive legal interests were coterminous with the boundaries of the state's physical ability to intrude. But as the cases have developed, the instincts (more than the analytical tools) of most of the other justices yielded greater caution.

The realization that the Court means "liberty" when it says "privacy" offers a ray of conceptual clarity heretofore unclear in some of the opinions. Knowing that the Court has been talking all along about protecting extraordinary aspects of personal "liberty" that should be shielded from official regulation because they are "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"³⁰⁸ the first question should be, what is the *nature* of the liberty interest at stake, and does it meet the established test for preferred constitutional status. The *weight* of the interest would not be relevant at that stage of analysis,³⁰⁹ even if the interest appeared weighty in terms of the degree of seclusion involved. A broad view of either privacy or autonomy escapes this absolutely essential first step of analysis. Without this methodology, autonomy or privacy, even in the best sense, stands to become meaningless by becoming limitless. Moreover, by first assessing the nature of the substantive interest involved, it is possible to weigh both the individual and social interests at stake ("the public goods that compete with 'privacy'") before concluding that the nature of the interest calls for heightened scrutiny.³¹⁰ If the activity, regardless of what it is, is presumed to be within the "right of privacy" simply because it was carried out in seclusion or in "intimate" circumstances, a strong presumption against *any* social or state interest is created before any real analysis ever takes place.

G. *The Contraception and Abortion Cases*

The abortion and contraception cases come closer than do the Court's other cases to departing from the traditional blood-marriage-adoption criteria, because these cases give constitutional protection

308. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

309. *Smith v. Organization of Foster Families for Equality and Reform (OFFER)*, 431 U.S. 816, 841 (1977).

310. See Part III A *infra*.

to unmarried persons whose prospective children are unborn. The task of reconciling these cases with the others is aided by the preceding sections, however, for the massive weight of the Court's other family-related decisions indicates no necessary implication that the Court will protect unmarried sexual privacy or the relational interest between unmarried persons.

In *Skinner v. Oklahoma*,³¹¹ the Court struck down on equal protection grounds a state law providing for the sterilization of "habitual criminals." Writing for a unanimous Court, Justice Douglas described the legislation as involving "one of the basic civil rights of man. Marriage and procreation," he wrote, "are fundamental to the very existence and survival of the race."³¹² Some twenty-three years later, Douglas again spoke about marriage as well as privacy in *Griswold v. Connecticut*,³¹³ in which Connecticut's prohibition against the use of contraceptives by married persons was held unconstitutional.

Up to this point, procreation and marriage were obviously linked. But in *Eisenstadt v. Baird*,³¹⁴ the Court extended the *Griswold* rule on contraception to unmarried persons on an equal protection theory. Justice Brennan's opinion in *Eisenstadt* probably generated more confusion about sexual privacy for the unmarried than any other Supreme Court opinion,³¹⁵ largely because he did not make it clear whether *Eisenstadt* extended to single persons the associational intimacy implicit in *Griswold*'s recognition of the marriage relationship, or merely the right of access to contraceptives.

The central issue (for our purposes) in analyzing the contraception and abortion cases is whether they are based on definitions of privacy or liberty broad enough to include sexual relations — as distinguished from decisions to prevent or terminate pregnancies — outside marriage. The Court's attitude toward sex outside marriage is not that difficult to detect, even in the language and reasoning employed in *Eisenstadt* and *Griswold*. In his concurring opinion in *Griswold*, for example, Justice Goldberg wrote that the constitutionality of Connecticut's laws against adultery and fornication was "beyond doubt," and that the *Griswold* holding "in no way interferes with a

311. 316 U.S. 535 (1942).

312. 316 U.S. at 541.

313. 381 U.S. 497 (1961); see note 242 *supra* and accompanying text.

314. 405 U.S. 438 (1972).

315. See Morse, *Family Law in Transition: From Traditional Families to Individual Liberties*, in *CHANGING IMAGES OF THE FAMILY* 327 (V. Tuftes & B. Myerhoff eds. 1979) (In *Eisenstadt*, the Court reflected "a profound shift in public attitudes toward sexual behavior" among the unmarried); see also note 382 *infra* and accompanying text.

State's proper regulation of sexual promiscuity or misconduct."³¹⁶ The opinion that has emerged over time as the most respected treatment of the *Griswold* case (especially as the Court has relocated the right of privacy in due process liberty)³¹⁷ is Justice Harlan's dissent in *Poe v. Ullman*,³¹⁸ a predecessor to *Griswold*. On the issue of extra-marital sex, Harlan wrote:

The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication, and homosexual practices . . . [confine] sexuality to lawful marriage, [and] form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.³¹⁹

Even in *Eisenstadt*, Justice Brennan's opinion conceded the legislature "a full measure of discretion in fashioning means to prevent fornication,"³²⁰ but he did not believe it was the purpose of the contraception statute at issue to regulate sexual relations.³²¹ Rather, he saw the law only as prohibiting the distribution of contraceptives.

The relationship between sexual privacy and contraception became even more focused in *Carey v. Population Services International*.³²² In *Carey* the Court found unconstitutional a New York statute forbidding the sale of contraceptives to married or unmarried persons under age sixteen. Though based on the right of privacy, *Carey* conveyed an unmistakable concern with protecting teenagers against venereal disease and unwanted pregnancies.³²³ The Court had no objection to the state's policy of reducing the incidence of premarital sex, but could see no evidence that withholding the availability of contraceptives accomplished that goal. Several of the Justices went out of their way to explain that they did not see *Carey* as establishing a constitutional right of sexual privacy for minors. In-

316. 381 U.S. at 498-99 (Goldberg, J., concurring).

317. See note 263 *supra* and accompanying text.

318. 367 U.S. at 497 (1961).

319. 367 U.S. at 546 (Harlan, J., dissenting).

320. 405 U.S. at 449.

321. 405 U.S. at 448. In Justice Brennan's subsequent opinion in *Carey v. Population Servs. Intl.*, 431 U.S. 678 (1977), he wrote (quoting, in part, from Justice Blackmun's opinion in *Roe v. Wade*) that "no court or commentator has taken the argument seriously" that laws limiting contraceptives and abortions were passed for the primary purpose of discouraging illicit sex. "The reason for this unanimous rejection was stated in *Eisenstadt v. Baird*: 'It would be plainly unreasonable to assume that [the State] has prescribed pregnancy and the birth of an unwanted child [or the physical and psychological dangers of an abortion] as punishment for fornication.' . . . We remain reluctant to attribute any such 'scheme of values' to the State." 431 U.S. at 694-95 (citations omitted).

322. 431 U.S. 678 (1977).

323. See notes 221-25 *supra* and accompanying text.

deed, Justices White and Stevens both regarded that inference as "frivolous."³²⁴ Justice Rehnquist cited *Doe v. Commonwealth's Attorney*³²⁵ for the proposition that, "[w]hile we have not ruled on every conceivable regulation affecting [sexual] conduct[,] the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been 'definitively' established."³²⁶ In the majority opinion, Justice Brennan wrote that "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [sexual] behavior among adults."³²⁷ This difference of opinion about the "definitive" status of *Doe v. Commonwealth's Attorney* between Justices Rehnquist and Brennan is attributable to the ambiguous status of a summary affirmance.³²⁸ Yet neither interpretation grants authority to conclude that the Court has protected sex outside marriage. The Court later denied certiorari from a decision upholding the discharge of two employees of a public library for adulterous cohabitation, which has no significance as a precedent; something about the Court's attitudes, however, is revealed by noting that the decision not to hear the case was made over the recorded — and, in one case, vigorous — dissents of Justices Marshall and Brennan.³²⁹ It appears that most of the Justices have consciously been unwilling to extend a right of sexual privacy to unmarried persons.

Some people nevertheless assume there is no material distinction between the decision to have sexual relations and the decision to use a contraceptive. They assume that if there is a constitutional right to *prevent* conception, there must be a right to *cause* conception; and

324. 431 U.S. at 703 (White, J., concurring); 431 U.S. at 713 (Stevens, J., concurring). Justice Powell added, "Neither our precedents nor sound principles of constitutional analysis require state legislation to meet the exacting 'compelling state interest' standard whenever it implicates sexual freedom." 431 U.S. at 705 (Powell, J., concurring).

325. 425 U.S. 901 (1976); see note 268 *supra* and accompanying text.

326. 431 U.S. at 718 n.2 (Rehnquist, J., dissenting).

327. 431 U.S. at 694 n.17.

328. In *Doe* the Court had summarily affirmed a three-judge federal district court. 425 U.S. 901 (1976). Justice Rehnquist's citation of *Doe* in *Carey* was followed by a citation to *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), which discussed a number of authorities holding that a summary affirmance by the Court is to be considered a disposition on the merits. The academic community had also taken *Doe* seriously enough that it caused "surprise and dismay" among those who had read "*Griswold* and its progeny . . . as leading toward a constitutional right of sexual freedom." Grey, *supra* note 10, at 85. Some of that reaction may have stemmed from criticism of the Court for disposing of *Doe* without hearing arguments or writing an opinion, even if affirmation of the result was on the merits. See G. GUNTHER, *supra* note 236, at 641.

329. *Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052, 1052-58 (1978) (Marshall, J., dissenting from denial of certiorari); see notes 268-69 *supra* and accompanying text; see also text following note 293 *supra*.

hence, the freedom to have sexual relations must be implied, since otherwise no conception is possible. However, these steps in reasoning do not logically flow from the premises of the contraception cases. Justice Brennan did cloud the issue somewhat when he said in *Eisenstadt* that the right of privacy protects "the decision whether to bear or beget a child."³³⁰ This broad language has led some to characterize the *Skinner-Griswold-Eisenstadt* line of cases as protecting a "right of procreative autonomy."³³¹

The contraception cases do not stretch that far. Justice Brennan later spoke more precisely of the "individual's right to decide to prevent conception."³³² The actual holding of the contraceptive cases can hardly mean otherwise, since the only laws addressed by the Court have been those that interfered with one's right to *prevent* conception. *Skinner* earlier dealt with the ability to *cause* conception, but only in the context of state action that would have resulted in permanent sterilization. Thus, the Court's decision preserved *Skinner's reproductive capacity*³³³ until such time as he could exercise it according to the laws that specify, in Justice Harlan's phrase, "when the sexual powers may be used."³³⁴

Contraception and sexual relations are simply two different things, one of which can be given legal protection without protecting the other. The teenage promiscuity problem reflected in *Carey* makes the distinction clear:

Common sense indicates that many young people will engage in sexual activity regardless of what the New York Legislature does

. . . .

. . . It is as though a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets. One need not posit a constitutional right to ride a motorcycle to characterize such a

330. 405 U.S. at 453.

331. L. TRIBE, *supra* note 91, at 944; *Developments, supra* note 10, at 1184.

332. *Carey*, 431 U.S. at 688.

333. 367 U.S. at 546 (Harlan, J., dissenting). One federal appellate court has observed that it may seem logical to infer a right of sexual privacy from the Court's decisions protecting procreative liberty, since "the [procreative] right becomes meaningless in the absence of a willing partner." *Poe v. Gerstein*, 517 F.2d 787, 797 (5th Cir. 1975). However, a case like *Skinner* does "not guarantee the individual a procreative opportunity," it merely safeguards "his procreative potential from state infringement." 517 F.2d at 797.

334. 367 U.S. at 546 (Harlan, J., dissenting). This language echoes Justice Marshall's observation in *Zablocki*, that since marriage is "the only relationship in which the State . . . allows sexual relations to take place," one's ability to marry should not be unduly restricted. The Court's language is fully quoted at note 205 *supra*. Yet, laws specifying age limits as a condition of marriage do not interfere with the constitutional right to marry. "A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it." *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622, 642 (1979) (plurality opinion).

restriction as irrational and perverse.³³⁵

Pursuing an analogy to this reasoning, it is quite possible that the availability of procedural guarantees in the Bill of Rights creates a greater incidence of criminal activity than if there were no such guarantees. This does not mean that allowing criminals constitutional rights makes their crimes lawful.³³⁶

The separate nature of contraception and sexual relations appears in other contexts, as well. For example, some groups in society have long regarded contraception, within or outside marriage, as an evil totally separate from the act of sexual relations. Some who hold this view would compare the use of certain contraceptives more to abortion than to anything else, because they see in such contraception a violation of natural processes or a self-induced abortion. Additionally, were a state to enact a law *requiring* contraception by women who had borne, say, two children, the Court's contraception cases would probably prohibit such regulation, as noted in Justice Goldberg's concurrence in *Griswold*.³³⁷ These instances illustrate that the subject of contraception does raise serious issues of its own, quite without regard to sexual privacy.

The abortion cases provide no greater recognition of a general right of sexual liberty outside marriage. *Roe v. Wade*³³⁸ applied to single as well as married women, and most of the abortion decisions, including those involving minors, have relied explicitly on the right of privacy. However, *Roe* rejected a broad right of individual autonomy allowing one to "do with one's body as one pleases."³³⁹ Moreover, since *Roe*, the Court has clearly placed abortion and contraception together as decisions "whether or not to beget or bear a child," which are "at the very heart of [the] cluster of constitutionally protected choices" involved in "marriage," "family relationships," and "child rearing."³⁴⁰ It should also be noted that the constitutional right developed in the contraception cases (which preceded the abortion cases) did not necessarily require the results

335. 431 U.S. 714-15 (Stevens, J., concurring).

336. See Grey, *supra* note 10, at 88 n.31.

337. While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts.

381 U.S. 479, 497 (1965) (Goldberg, J., concurring).

338. *Roe v. Wade*, 410 U.S. 113 (1973).

339. See notes 263-65 *supra* and accompanying text.

340. *Carey*, 431 U.S. at 685.

achieved in the abortion cases.³⁴¹

The minors' abortion cases have also developed in a way that suggests that the right of privacy developed by the Court is intended to protect specific liberty interests related to marriage and childbearing more than it is to authorize a general right of personal autonomy. These cases brought to the Supreme Court, for the first time, a confrontation between the alleged constitutional rights of parents and the rights of their child, with both claims arising from the same line of cases. The assumptions one makes about the cast of characters involved in these cases are crucial. When the minor is seen as herself a potential parent, the situation becomes unique — which is how the Court has treated minors' rights to abortions as distinguished from other choice rights to which minors might arguably be entitled.³⁴²

The Court's contraception and abortion cases do not depart from the touchstones of marriage and kinship as the criteria for determining the relational and sexual interests protected by the Constitution, even though the cases include single, unmarried persons. In a broad sense, these are "simply family planning cases" which represent "two standard conservative views":

that social stability is threatened by excessive population growth; and that family stability is threatened by unwanted pregnancies, with their accompanying fragile marriages, single-parent families, irresponsible youthful parents, and abandoned or neglected children.³⁴³

The cases speak in terms of individual privacy because "[t]he conventions of constitutional adjudication of course demanded that the decisions be justified, not on the basis of social stability, but in the language of individual rights."³⁴⁴ In addition, the interests given protection in these cases really are different from sexual activity per

341. The arguably countervailing interest of the fetus in an abortion case poses an obstacle to a negative decision about childbearing not present in the case of contraception. Indeed, the *Roe* Court could logically have concluded that the state interest in protecting the unborn was strong enough to override a pregnant woman's right of privacy, without seriously challenging the parental and other family rights established in the line of cases stretching from *Meyer v. Nebraska* to *Eisenstadt*. Heymann & Barzelay, *supra* note 71, at 775. In a sense, a pregnant woman and an unborn child each has her own kind of claim on the interests of life and liberty in the fourteenth amendment's due process clause. The proposition that a pregnant woman may unilaterally determine the fate of an unborn child is no easier to defend than the proposition that a state may unilaterally require a pregnant woman to carry an unborn child to its birth, especially when doing so poses no serious risk to her. How the matter is determined turns entirely on the choice one makes, *a priori*, about the nature of an unborn child. Given the Court's implicit assumption that a fetus is not close enough to being either "life" or a "person" to warrant its own constitutional protection, *Roe* is consistent with the constitutional interest in advancing the private sanctity of childbearing decisions. Without that assumption, *Roe* must simply be rejected.

342. See note 234 *supra* and accompanying text.

343. Grey, *supra* note 10, at 88.

344. *Id.*

se, because sex unrelated to childbearing "does not produce the same kind of nearly irrevocable effects, nor spring from the same deep well of cultural values as do decisions about marriage, procreation, or child rearing."³⁴⁵

These cases can also be seen as arising from kinship interests. The decision whether to use a contraceptive may be seen as the earliest manifestation of a potential child-parent relationship.³⁴⁶ If the contraceptive is not used and conception occurs, a very serious commitment arises. The abortion right allows one more opportunity to make the childbearing choice. For unmarried persons, contraception and abortion are not decisions concerning long-term commitments to one's sexual partner; they are decisions concerning long-term commitments to one's own potential offspring. Similarly, a single woman's relational interest with her sexual partner does not give rise to constitutional protection for her decision; rather, it is her potential relational interest with her child. In this sense, her decision involves, in Hawthorne's words, "a quality of awful sacredness in the relation between this mother and this child."³⁴⁷ Such decisions affect the earliest possible creation of kinship. This aspect of contraception and abortion reflects the overtones of relational — as distinguished from individual — interests in the family privacy cases. To see the cases totally as reflections of individual privacy is to miss that point. Family means relationships, permanent relationships; and permanent relationships are established by marriage and kinship.³⁴⁸

345. Heymann & Barzelay, *supra* note 71, at 774.

346. Marriage, contraception, and abortion "clearly delineate a sphere of interests. . . . At the core of this sphere is the right of the individual to make for himself . . . the fundamental decisions that shape family life: whom to marry; whether and when to have children; and with what values to rear those children." *Id.* at 772.

347. See note 127 *supra* and accompanying text.

348. Marriage and kinship are *relational interests*. They are not individual interests that exist separate and apart from a relationship with another person. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), the Court said "the constitutionally protected privacy of family, marriage, motherhood, procreation and child rearing is not just concerned with a particular place, but with a *protected intimate relationship*." 413 U.S. at 66 n.13 (emphasis added). The categorizing of *relational* interests as a distinct category from interests in *property* and *personality* is largely attributable to the work of Dean Leon Green in the field of tort law. See generally L. GREEN, W. PEDRICK, J. RAHL, E. THODE, C. HAWKINS, A. SMITH & J. TREECE, *ADVANCED TORTS: INJURIES TO BUSINESS, POLITICAL AND FAMILY INTERESTS* (1977); L. GREEN, *THE LITIGATION PROCESS IN TORT LAW* 413-507 (1965). This category recognizes family, trade, political, professional, and general social relationships. Injuries to these relationships may result in damage actions for such torts as wrongful death, loss of consortium, interference with contractual relations, and defamation. In each case, the injury is to the relational interest between two or more parties, as distinguished from an injury to one's person or one's property. It is, by definition, not possible for a compensable injury to occur in the absence of a legally protected relationship. Roscoe Pound had written earlier about "interests in domestic relations." See Pound, *supra* note 21, at 177. With relational interests of the family in mind, Henry Foster has observed that "there has been a historical evolution from the *group*

It is not my purpose to defend the results of the abortion and contraception cases, especially since many of the results were not compelled by the principles on which the Court relied. I have only sought to show that these cases are consistent with those previously discussed in not protecting sexual privacy for the unmarried and in not disturbing the preferred legal status given to formal marriage and kinship. At the same time, it is only fair to observe that *Eisenstadt*, *Roe*, *Carey*, and *Planned Parenthood v. Danforth*³⁴⁹ — even though they do not pierce the veil of marriage and kinship — may not seriously further the purposes of giving extraordinary legal preference to the family. It is arguably a complete perversion of the liberty of parenthood to believe that a woman may terminate a pregnancy because of some variation on the theme of a “parental” right. If the fetus she carries is significant enough to give rise to such a lofty claim, it is significant enough to bar an abortion as the earliest form of child abuse. And if these really are rights pertaining to kinship, why does the father of an unborn child have nothing to say about the decision to continue or terminate the pregnancy?³⁵⁰ Surely it is not because the state “cannot ‘delegate to a spouse a veto power

interests of the family presided over by the paterfamilias, to an increased recognition of *individual* interests of family members and the *social* interest in both individuals and the family group.” Foster, *supra* note 20, at 494. Thus, the interests of family members in their relationships with one another are individual, not group, interests; however, the individual interest involved is best understood as a relational interest with one or more other persons. Furthermore, the permanent character and the inherent obligations of the relational family interest make the interest one of “status and its incidents.” *Id.* at 494; see Conclusion *infra*.

These observations have several implications for analyzing the *nature* of legally protected family interests. For example, “the family” is not to be regarded (as it was in earlier centuries) as a group entity consisting of husband and wife as one person (the husband) and their children as their chattels. Under modern concepts, the family consists of persons having important relational interests in their ties to one another, with those interests enforceable by individual parties to the relationship. Thus, while the use of individual rights doctrines may be clumsy in some family contexts, the use of those doctrines by no means signifies “changes in the structure of American family life.” L. TRIBE, *supra* note 91, at 987. Moreover, an unmarried individual’s *personality* right to sexual privacy or sexual gratification is not logically inferable from the protections the Court has confined to certain *relational* interests. Asserted rights to adult companionships outside marriage may stand on a different footing because the nature of the asserted right is relational; however, without marriage or kinship, the impermanent nature of the relationship would still disqualify it. It is, therefore, not as puzzling as it may seem that the Court has located a series of constitutionally protectable values “principally . . . in the ‘area’ (at least the Court sees it as an area) of sex-marriage-childbearing-childrearing . . . ,” even though it may have appeared that “[t]he Court has offered little assistance to one’s understanding of what it is that makes all this a unit.” Ely, *The Supreme Court, 1977 Term — Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 11 & n.40 (1978). The conceptual “unit” that binds these family-related decisions is the notion of a permanent, relational interest. Only interests relating to marriage and kinship comprise such a conceptual unit.

349. 428 U.S. 52 (1976).

350. See 428 U.S. 52.

which the state itself” does not possess,³⁵¹ because the liberty interest of biological kinship originates “not in state law, but in intrinsic human rights” that are “entirely apart from the power of the State.”³⁵² Justice Blackmun tells us further that “when the wife and the husband disagree” about having an abortion, “the view of only one of the two marriage partners can prevail.”³⁵³ Yet if that same unborn child were carried to term, *both* parents would have the authority to withhold consent to placing the child for adoption. Neither would have a “veto power” over the interests of the other, because each literally has a kinship interest. How is “potential life” any different, when it has been created by the most equal of joint ventures? The difference, we are told, is that “the woman . . . physically bears the child” and is “more directly and immediately affected by the pregnancy.”³⁵⁴ If the direct effects of pregnancy are the source of her interest, it is difficult to see how those effects — except in the case of a therapeutic abortion — could outweigh the traditional interest of the Constitution in family relationships and child-rearing, an interest the father has and will continue to have if the child is born and raised — no matter which parent then carries the heavier physical burdens of childrearing.

The Court also tells us, on the one hand, that “the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors,” and that “[t]he child is not the mere creature of the State.”³⁵⁵ But, on the other hand, it tells us that the State “does not have the constitutional authority” to delegate to a “third party” (like a father and mother) the right to control their minor child’s decision about an abortion, because the State cannot give authority it does not have.³⁵⁶ Elsewhere the Court destroys its own nondelegation argument by acknowledging that parental authority derives not from the State, but from “intrinsic human rights.”³⁵⁷

In another context, the Court rejects the historic jurisprudential concept for objectively determining mature capacity in favor of a “mature minor” rule it seems to have discovered, but which does not

351. 428 U.S. at 69 (quoting *Planned Parenthood v. Danforth*, 392 F. Supp. 1362, 1375 (E.D. Mo. 1975)).

352. *Smith v. Organization of Foster Families for Equality and Reform (OFFER)*, 431 U.S. 816, 845 (1977) (footnote omitted).

353. 428 U.S. at 71.

354. 428 U.S. at 71.

355. *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 637 (1979) (plurality opinion).

356. 428 U.S. at 74.

357. *Smith v. Organization of Foster Families for Equality and Reform (OFFER)*, 431 U.S. 816, 845 (1977).

exist in a common law tradition full of cases and standards for parental consent to medical treatments on minors.³⁵⁸ Then, ironically, the Court decides that if a minor woman is not mature enough to make her own choice, she should look — not to her parents, for they might have a bias — but to a trial judge (who is presumably without biases) for a determination of whether an abortion is in her best interests. Thus the Court rejects still another fundamental principle of family law, that parents should supervise the medical choices of minors lacking capacity, unless the parents are incompetent — then and only then, the State should step in as parent.

In the contraception cases, it is one thing to respect the privacy, the sexual intimacy, and the procreation choices of a married couple, as *Griswold* does. It is one thing to protect permanent procreative capacity, as *Skinner* does. But it is quite another to speak of “procreation choices” for unmarried persons and promiscuous teenagers. They do not live in recognized intimate relationships, nor do they face the permanent deprivations of sterilization. If some single person is so concerned about not entering into a child-parent relationship, let her abstain from sexual relations — the State has not foreclosed that alternative, nor does the Constitution prize her sexual relations independent of childbearing issues. If teenagers threaten themselves and each other with the risks of venereal disease and unwanted pregnancies, they need protection. Finding that protection is a difficult issue of social policy; it is not necessarily the duty of a constitutional right whose purpose is to sustain serious family relationships of a kind implicit in the concept of ordered liberty.

Perhaps John Noonan is right in believing that the rationale of *Eisenstadt* was created with *Roe* in mind, since *Roe* was argued before *Eisenstadt* was handed down.³⁵⁹ Perhaps he is even right that these two cases *can* be read as implicitly rejecting the family unit so carefully nourished through *Meyer* and *Pierce* and *Griswold* in favor of “a society of isolated individuals.”³⁶⁰ The close timing between *Eisenstadt* and *Roe* may tell us that the Court was simply committed to invalidating state abortion laws because it was convinced they were wrong, and *Eisenstadt* would broaden the theoretical base. And perhaps it has all turned out to be the Supreme Court’s own kind of Vietnam. Somehow, with good intentions, the Justices may have gotten mired into an abortion land war, carried away by the

358. See note 238 *supra* and accompanying text.

359. J. J. NOONAN, A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 21 (1979).

360. *Id.*

mysterious charisma of "privacy." Even if all that is true, they seem now to have begun their disengagement before it is too late. The experience since *Roe* shows a tendency to pull back, a desire to fix a mistake by calling substantive due process what it is, and a determination not to cross into the never-never land of sexual privacy for unmarried couples.

H. *Sexual Privacy for the Unmarried?*

Even though, as Thomas Grey correctly observed, "the Court has given no support to the notion that the right of privacy protects sexual freedom,"³⁶¹ many commentators³⁶² and a few lower courts³⁶³ have assumed otherwise. The foregoing summary demonstrates that a right of sexual freedom cannot reasonably be inferred from the procreative rights recognized by the Court,³⁶⁴ nor has the Court developed a general right of personal privacy or autonomy broad enough to include sex outside marriage.³⁶⁵ Still, some have read into the cases a basis for sexual liberty on slightly different grounds.

One approach puts *Stanley v. Georgia*³⁶⁶ together with *Eisenstadt* and finds that the right of privacy protects "decisions" to "seek sexual gratification," — including gratification from "what at least once was commonly regarded as 'deviant' conduct"³⁶⁷ — made voluntarily by adults in a "noncommercial, private setting."³⁶⁸ Putting the

361. Grey, *supra* note 10, at 86.

362. *See* note 10 *supra*.

363. *E.g.*, *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976) (sodomy statute unconstitutional as applied to unmarried consenting heterosexual couple); *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977) (fornication statute violates right of privacy); *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980) (statute prohibiting consensual sodomy violates right of privacy and equal protection), *cert. denied*, 451 U.S. 987 (1981); *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980) (statute prohibiting voluntary deviate sex between unmarried persons has no rational basis and violates equal protection). *Contra*, *State v. Bateman*, 113 Ariz. 107, 547 P.2d 6, *cert. denied*, 492 U.S. 864 (1976); *State v. Elliot*, 89 N.M. 305, 551 P.2d 1352 (1976); *State v. Santos*, 413 A.2d 58 (R.I., 1980). In general, "only a very few decisions have led to the invalidation or narrowing" of criminal sex laws, partly because "most courts [have] managed to circumvent the issue." Note, *supra* note 32, at 720. For a summary of these cases, see *id.*; *see also* Annot., 58 A.L.R.3d 636 (1974).

364. *See* Part II G *supra*.

365. *See* Part II F *supra*.

366. 394 U.S. 557 (1969). Any reliance on *Stanley's* libertarian overtones — even among "consenting adults" — is probably misplaced since *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). *See* text at notes 251-58 *supra*.

367. *People v. Onofre*, 51 N.Y.2d 476, 488, 415 N.E.2d 936, 940, 434 N.Y.S.2d 947, 951 (1980), *cert. denied*, 451 U.S. 987 (1981).

368. *People v. Onofre*, 51 N.Y.2d 476, 488, 415 N.E.2d 936, 940-41, 434 N.Y.S.2d 947, 951 (1980), *cert. denied*, 451 U.S. 987 (1981). The "private settings" in *Onofre* included "an automobile parked on a street in the City of Buffalo in the early morning hours," and a "truck parked on a street in a residential area of the city about 1:30 a.m." 51 N.Y.2d at 484, 415 N.E.2d at 938, 434 N.Y.S.2d at 948.

right of sexual freedom in "gratification" terms gives rise to an important issue about the whole theory of determining what is meant by "liberty" in the due process clause. An analogy to the relationship between obscenity and the first amendment will make the point.

Since the question first arose in 1942, the Court has regarded obscenity as expression outside of first amendment protection.³⁶⁹ The basis for this categorization has been the Court's view that obscenity has not "the slightest redeeming social importance" because its only purpose is to appeal "to prurient interest."³⁷⁰ In *Miller v. California*,³⁷¹ the Court's most recent attempt to state a comprehensive test for defining obscenity, the Court reiterated the basis for distinguishing between protected and obscene speech:

[T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. "The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people," But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.³⁷²

Free speech has thus enjoyed a preferred constitutional status in large part because of the relationship of unrestrained discourse to the underlying political theory of democracy. Some *social interest* or *public good* has been served by the first amendment — it does not exist solely to protect immediate individual liberty without regard to larger interests. As the obscenity category illustrates, "[t]he scope of First Amendment protection is determined by the rationale underlying freedom of speech."³⁷³ Similarly, the scope of privacy as part of due process liberty should be determined by the rationale that underlies its protected status.³⁷⁴

369. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

370. *Roth v. United States*, 354 U.S. 476, 484, 487 (1957).

371. *Miller v. California*, 413 U.S. 15 (1973).

372. 413 U.S. at 34-35 (citations omitted). Consider also Justice Stevens's illustration: Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every school child can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theatre of our choice.

Young v. American Mini Theatres, 427 U.S. 50, 70 (1976).

373. Schauer, *supra* note 298, at 909.

374. See Part III *infra*.

With this background, a comparison of obscenity and “gratification” will lead to a comparison of the proper analytical approaches to both free speech and privacy. Frederick Schauer has written that the key to understanding the Court’s treatment of hard-core pornography as nonspeech (for first amendment purposes) is in realizing that the primary purpose of pornography is to produce sexual excitement — it does not intend to communicate intellectual content. “The pornographic item is in a real sense a sexual surrogate. It takes pictorial or linguistic form only because some individuals achieve sexual gratification by those means.”³⁷⁵ Thus, “[t]he concept fundamental to the *Miller* test is that material appealing to the prurient interest *is* sex, and not merely describing or advocating sex.”³⁷⁶ But if one now, in the name of privacy, extends constitutional protection to the right to seek sexual gratification, there would obviously be a right to pursue anything that responds only to the prurient interest. *A fortiori*, the Court would be forced to change its entire approach to obscenity — not because of new light on the first amendment, but because under this approach, privacy includes the pure gratification that speech excludes. In addition, problems nearly as vexing as defining obscenity could arise in attempting to define a “noncommercial, private setting.”³⁷⁷

If obscenity “demeans the grand conception of the first amendment and its high purposes in the struggle for freedom,” mere gratification, apart from any reference to relationships or procreation (let alone marriage or kinship),³⁷⁸ is likely to demean the grand conception of due process liberty and *its* high purposes. That proposition can best be tested by reference to the conceptual origins and the purposes of the family privacy cases. When that is done,³⁷⁹ it is not difficult to see that a gratification test for constitutional liberty is just as demeaning when applied to the fourteenth amendment as it is

375. Schauer, *supra* note 298, at 922.

376. *Id.* at 928.

377. The New York Court of Appeals considered vehicles parked on residential streets to be “private” settings. *See* note 368 *supra*. As for defining “commercial,” consider *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977), in which the New Jersey Supreme Court found a fornication statute to violate the “fundamental right of privacy” of two men who engaged in sexual relations with two women in a parked car. The women, both of whom had been arrested in the past for prostitution, agreed to have sexual relations with the men in exchange for “refers.” When the men admitted they had no refers, the women “indignantly demanded \$10 for each act of sexual intercourse,” which the men refused “and the argument became more heated.” 75 N.J. at 205, 381 A.2d at 335. Noncommercial? This entire misguided approach derives from the tendency to equate “privateness” with substantive values deserving constitutional recognition. *See* notes 302-08 *supra* and accompanying text.

378. *See* note 348 *supra*.

379. *See* Part I *supra*.

when applied to the first amendment.³⁸⁰

Another argued justification for extending sexual liberty to the unmarried is the idea, derived from *Eisenstadt's* equal protection origins, that discrimination regarding private or intimate decisions on the basis of marital status is impermissible.³⁸¹

This equal protection theory offers little help to those seeking protection for informal relationships. Amid the "nearly incomprehensible muddle"³⁸² of the *Eisenstadt* opinion, it is clear that Justice Brennan's opinion for the majority of four relied on the rational basis test, making no attempt to identify a fundamental right or to imply the need for any degree of heightened scrutiny with classifications based on marital status.³⁸³ Moreover, since *Eisenstadt*, the Court has unanimously upheld a classification explicitly based on marital status, even though the classification arguably impinged on the right to marry,³⁸⁴ because "[c]lassification based on marital status has been an accepted classification" in a large variety of regulatory contexts.³⁸⁵ Indeed, the maintenance of legal discrimination between the married and the unmarried not only literally determines a state's ability to regulate marriage as a social institution, but also governs important individual relational interests that have long since inhered in the marriage relationship, from property interests to taxes and torts.

By going outside marriage to protect the rights of illegitimate

380. Even some who are persuaded by certain aspects of a proposed expansion of constitutionally protected "lifestyles" are "wary of creating, in the high name of constitutional right, nothing more than a regime of self gratification and indulgence." Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 625 (1977).

381. This was an alternate basis for the decision in *People v. Onofre*, 51 N.Y.2d 476, 491-92, 415 N.E.2d 936, 942-43, 434 N.Y.S.2d 947, 953 (1980), *cert. denied*, 451 U.S. 987 (1981). See notes 367-68 and accompanying text. It was also relied on by the Pennsylvania Supreme Court in holding unconstitutional a statute that prohibited "deviate" sex between persons who were not husband and wife. *Commonwealth v. Bonadio*, 490 Pa. 90, 98-99, 415 A.2d 47, 51-52 (1980). The defendants in the case were the owner and several employees of an adult theatre in which the dancers engaged in acts prohibited by the statute with members of the audience who had paid admission fees. 490 Pa. at 101, 415 A.2d at 52 (Nix, J., dissenting). The Court also quoted Mill's *On Liberty* at length, 490 Pa. at 96-98, 415 A.2d at 50-51, even though no right of privacy was mentioned in the case, presumably because of the commercial setting. Relying on state power to regulate liquor consumption under the twenty-first amendment, the Supreme Court had upheld a regulation prohibiting almost identical conduct in a live entertainment bar. See *California v. LaRue*, 409 U.S. 109 (1972).

382. Grey, *supra* note 10, at 88. Dean Wellington observed that *Eisenstadt* "abandoned" "any effort at analysis." Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 297 (1973).

383. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) ("The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons . . .").

384. *Califano v. Jobst*, 434 U.S. 47 (1977).

385. *Zablocki v. Redhail*, 434 U.S. 374, 403 (1978) (Stevens, J., concurring).

children, the rights of unwed parents in their children, and the right of unmarried women to prevent or terminate a pregnancy, the Court has obviously established that marriage is not the sole criterion for locating constitutional rights related to family interests. We have already seen, however, that the rights of illegitimate children do not give constitutional sanction to the relationship between their parents. The interests that have been recognized in the child-parent relationship outside marriage are based on the biological kinship tie that has so long been acknowledged as a source of extraordinary protection. There is no such tie between the parents of an illegitimate child, or between other cohabiting couples. Only marriage creates a tie of that character between unrelated adults. Similarly, rights to prevent or terminate a pregnancy, as noted previously,³⁸⁶ arise from such factors as the law's unwillingness to force the creation of an unwanted child-parent kinship tie — again out of respect for the profound nature of kinship.

If these distinctions seem to quibble over metaphysical technicalities, a broader substantive justification emerges from the underlying policies that have led to constitutional protection for the exclusive “cluster of constitutionally protected choices” deliberately limited to “marriage, procreation, contraception, family relationship, and child rearing and education.”³⁸⁷ These underlying policies, discussed previously,³⁸⁸ have no primary interest in sex per se. The Constitution does not protect marriage simply because there is “gratification” there, or because marriages exist in such “property” as a home, or because the regulation of any intimacy is akin to an unreasonable search and seizure.³⁸⁹ Rather, as Justice Harlan put it, marriage and the home derive *their* preeminence from being “the seat of *family life*. And the integrity of *that* life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted constitutional right.”³⁹⁰ The sexual relationship that is part of marriage is “necessarily an essential and accepted feature of the institution of marriage, an institution which the State . . . always and in every age . . . has fostered and protected.”³⁹¹ Stated another way by Dean Harry Wellington:

Love and sexual gratification can and do exist outside of marriage and

386. See Part II G *supra*.

387. *Carey v. Population Servs. Intl.*, 431 U.S. 678, 685 (1977) (citations omitted).

388. See Part I *supra*.

389. See Part II F *supra*.

390. *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting) (emphasis added).

391. *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting).

they can and do fail to exist in marriage, but this is not the point. The point is that the state has undertaken to sponsor one institution that has at its core the love-sex relationship. *That relationship* demands liberty in the practice of the sexual act.³⁹²

The sexual relationship alone, then, commands no protection outside marriage.

This society's normative and legal tradition of maintaining laws that "provide . . . when the sexual powers may be used . . . [and confine] sexuality to lawful marriage"³⁹³ is not a trivial basis for discrimination. It is, rather, in Justice Harlan's words, a very deliberate "pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."³⁹⁴ To extend constitutionally sanctioned sexual privacy beyond marriage would not only *depart* from that pattern, it would seriously undermine it. Indeed, "not to discriminate" between fornication and sex within marriage "would entirely misconceive" the point of giving marriage a preferred constitutional status.³⁹⁵ We saw in Part I, *supra*, some portion of the policy basis for the constitutional protection given to marriage. If, in deference to sexual liberty for unmarried persons, discrimination on the basis of marital status were made, say, a suspect classification, we would put at risk the entire foundation of those concepts.³⁹⁶

There is at least a rational basis for distinguishing between sex within marriage and sex outside marriage. More than that, there is ample justification for the conclusion Justice Harlan said had been reached by "every society in civilized times," for "confining sexuality

392. Wellington, *supra* note 382, at 292 (emphasis added). Karl Llewellyn has also noted that the functions of marriage include

[r]egulation, then, of sex contacts; above all, an astounding reduction of conflict between men over women. Without permanency of relation this seems difficult for our civilization to achieve. An evening in a sailor's dive will prove persuasive A partner who can leave at will is still in the market.

. . . .

A proper sailor's prostitute can offer comfort but hardly such a foothold. Concubinate, that may be gone tomorrow, is more; it sometimes suffices; as an institution it is not enough.

Llewellyn, *Behind the Law of Divorce: I*, 32 COLUM. L. REV. 1281, 1288, 1294 n.31 (1932) (citation omitted).

393. *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting).

394. *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting).

395. *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting) (emphasis added).

396. "Democracy began by freeing the desires, and whether it lives or dies depends on its ability somehow to domesticate them; not to suppress them, but to so arrange matters as to ensure that the freed desires are made compatible with civil society." W. BERNS, *supra* note 57, at 223. Berns derives some authority for his view from De Tocqueville's observation that, "No free communities ever existed without morals . . ." A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 233 (R. Heffner ed. 1956).

to lawful marriage."³⁹⁷ Sexual privacy outside marriage is not warranted by an unlimited, grand view of personal autonomy; it is not part of "procreative" freedom; "gratification" holds no special place in the constitutional scheme; and discrimination between the married and the unmarried is not only supportable, but is essential to the historical position of preference this society has so long assigned to the institution of marriage.³⁹⁸

397. *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting).

398. Others have also observed that it has been widely characteristic of modern civilization to confine sexual expression to marriage. The social importance of this channeling process "is a view that has been central to modern thought and far more widely accepted in our time than contemporary versions of the liberalism of John Stuart Mill." Grey, *supra* note 10, at 91. Thomas Grey has summarized the writings of Freud, Durkheim, and Weber, documenting their shared judgment that "communal life, whether in the family or the larger society, depends directly on sexual repression." *Id.* at 91-93. Not only these writers, but "every thinker of the great central tradition of the last century's social thought has seen repressed sexuality and the authoritarian family structure as close to the core of our civilization. Conservative theorists have defended repression as necessary; revolutionaries have urged that society would have to be overthrown to free us from its tyranny." *Id.* at 92. Freud was concerned not only with civilization's need to "use its utmost efforts in order to set limits to man's aggressive instincts," S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* 59 (J. Strachey trans. 1961), but also with occasional harm to the individual psyche by repression. Others, such as Max Weber and some leading Marxist writers, linked sexual repression to the needs of capitalism. Some capitalists have understood this link to be based upon the need to maintain order for the sake of productivity. The Marxists, by contrast, have "argued that the humane goal of sexual liberation could only come with the destruction of capitalism." Grey, *supra* note 10, at 94.

Contemporary writers such as Christopher Lasch and George Gilder believe the traditional American sexual ethic serves cultural needs that are more affirmative and far-reaching. For Lasch, a value transmission system based on the authoritarian family structure has enormous implications for the development of both individual conscience and public virtue — issues that bear directly on the underlying purpose for the constitutional preference given to family life. See C. LASCH, *supra* note 45; notes 52-63 *supra* and accompanying text. Gilder deals more specifically with American sexual attitudes, finding that the country's recent interest in unconventional sexual arrangements promotes "a form of erotic suicide. For it is destroying the cultural preconditions of profound love and sexuality: the durable heterosexual relationships necessary to a community of emotional investments and continuities in which children can find a secure place." G. GILDER, *supra* note 28, at 5. Gilder argues that female sexuality has a way of contributing to — perhaps even controlling — the domesticating and civilizing aspects of life, both for families and for society at large. This civilized domestic realm permits the moral, aesthetic, religious, social, sexual, and other nurturing values of the community to take root and flourish; and "[i]n these values consist the ultimate goals of human life." *Id.* at 245.

The relationship between all this and confining sex to marriage begins with a man's conscious or unconscious desire to identify and keep his offspring. To do this

[h]e must choose a particular woman and submit to her sexual rhythms if he is to have offspring of his own. His love defines his choice. His need to choose evokes his love. His sexual drive lends energy to his love and gives shape, meaning, and continuity to his sexuality. When he selects a specific woman, he in essence defines himself both to himself and in society. Every sex act thereafter celebrates that definition and social engagement.

Id. at 35.

However, when sexual expression becomes separated from the psychological commitments of enduring love, it "leads to emotional fragmentation in time rather than to a sense of continuity with nature and society." *Id.* at 39. As a result, to view sexual experiences "as if they were optional indulgences rather than the definitive processes of our lives," *id.* at 7, is to threaten in a grave sense "a civilization dependent on long-term commitments and sexual patterns." *Id.* at 41.

Consider also the observation of D.H. Lawrence:

III. TOWARD A CONSTITUTIONAL TEST FOR FAMILY LIBERTY

A. *Due Process "Liberty," Heightened Judicial Scrutiny, and the Burden of Proof*

In adjudicating constitutionality, a major distinction exists between legislation that should be subjected to minimal judicial scrutiny and legislation that should be subjected to heightened scrutiny.³⁹⁹ The Supreme Court generally defers to state legislative judgments by giving them only minimal scrutiny, except when fundamental liberties or suspect classifications are involved. Prior to the Great Depression, individual economic interests were sometimes protected by heightened scrutiny as part of due process liberty under the much debated doctrine of substantive due process.⁴⁰⁰ During this same era, the Court, in *Meyer v. Nebraska*,⁴⁰¹ also recognized the liberty of parents to direct the rearing of their children as a substantive due process liberty interest, perhaps in part because the Constitution contains no explicit guarantee for freedoms related to family interests.⁴⁰² In 1937,⁴⁰³ the Court made its historic shift to the present doctrine that legislation regulating economic interests will be upheld under minimal scrutiny tests so long as the regulation bears "a reasonable relation to a proper legislative purpose" and is "neither arbitrary nor discriminatory."⁴⁰⁴ With this decline of substantive due process as an accepted source of authority, the Court based some of its subsequent decisions dealing with protected family interest on such other heightened scrutiny sources as the equal protection clause,⁴⁰⁵ the free exercise of religion,⁴⁰⁶ and the right of pri-

The instinct of fidelity is perhaps the deepest instinct in the great complex we call sex. Where there is real sex there is the underlying passion for fidelity. And the prostitute knows this, because she is up against it. She can only keep men who have no real sex, the counterfeits: and these she despises. The men with real sex leave her inevitably, as unable to satisfy their real desire.

D. LAWRENCE, *supra* note 88, at 31.

399. See generally G. GUNTHER, *supra* note 236.

400. *E.g.*, *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

401. 262 U.S. 390 (1923); *accord*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

402. The reason for this omission may be attributable to the Constitution's original interest in political legislation as distinguished from civil legislation. See Conclusion *infra*.

403. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). However, it was 1955 before the Court could state unanimously that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

404. *Nebbia v. New York*, 291 U.S. 502, 537 (1934).

405. *E.g.*, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

406. *E.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

vacy.⁴⁰⁷ In its most recent family cases, however, the Court has candidly brought due process liberty out of mothballs.⁴⁰⁸ This increasing reliance on substantive due process has been recognized in one comprehensive survey as "the ultimate basis of protection" in the family cases, which "itself is a constitutional development of major importance."⁴⁰⁹

Judicial recognition of a substantive due process liberty interest gives extraordinary constitutional protection to the activity involved. Such judicial recognition, however, differs substantially from legislative action to accomplish the same result, no matter how similar the specific decrees may be. To put this difference in perspective, consider the distinctions between these categories of conduct:

- (1) *protected* conduct (such as political speech), which is protected by a preferred constitutional right;
- (2) *permitted* conduct (such as driving a car), which is the subject neither of constitutional protection nor of unusual prohibitions; and
- (3) *prohibited* conduct (such as robbery) which is forbidden by a criminal sanction or by a classificatory scheme that (sometimes harshly) excludes persons in certain categories.

The law creates a natural spectrum with protected activity on one extreme, prohibited activity on the other extreme, and a broad range of permitted activity in the middle. We may say that sexual intimacy between *married* persons is protected by a constitutional right which recognizes not only a freedom of procreative choice, but recognizes that the marriage relationship itself is protected as "intimate to the degree of being sacred."⁴¹⁰ State criminal laws against adultery and fornication place sexual relationships between the *unmarried* in the prohibited category. If a *legislature* removes such crimes from its statutory scheme, however, as some states have done,⁴¹¹ sexual conduct between the *unmarried* moves from category (3) to category (2). — it becomes permitted, even though it is not yet protected. Simi-

407. See Part II F *supra*.

408. See *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

409. *Developments, supra* note 10, at 1161-62. It would unduly broaden the scope of this Article to plunge fully into the controversial thicket of substantive due process. For present purposes, I will simply agree with Archibald Cox that:

The Court's persistent resort to notions of substantive due process for almost a century attests the strength of our natural law inheritance in constitutional adjudication, and I think it unwise as well as hopeless to resist it.

A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 113 (1976).

410. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

411. See *Grey, supra* note 10, at 95; Note, *Fornication, Cohabitation, and the Constitution*, 77 MICH. L. REV. 252, 254 (1978). ("[Fornication] remains a crime in [only] fifteen states and the District of Columbia." (footnote omitted)).

larly, in a custody proceeding, a trial judge may elect to place a child in the custody of a parent living in unmarried cohabitation. The judge's action gives the cohabitation a permitted status, but it does not give it constitutional protection.

The practical difference between permitted and protected conduct is that the state may more easily interfere with permitted conduct than with protected conduct. For example, a cohabiting custodial parent's moral conduct, considered along with the parent's overall characteristics in comparison with the other parent's, could reach levels suggesting that a child's best interests would be served by a change in custody — and such could be accomplished without ever implicating a constitutional right.

On the other hand, if a *court* finds a state's adultery and fornication laws unconstitutional, sexual conduct between consenting adults takes on a protected status. As a result, the state's interest in promoting traditional sexual morality would be more difficult to sustain in noncriminal contexts. For instance, New York's highest court recently struck down that state's anti-sodomy law on constitutional privacy grounds.⁴¹² Shortly thereafter, a lower New York court permitted one adult homosexual to adopt another adult homosexual. The lower court noted that prior New York case law would have barred such adoptions as being "against public policy," but that the more recent privacy case was "dispositive of the public policy issue," conveying "eloquent pronouncements [having] considerable import for the wider public policy consideration of public morality."⁴¹³

These cases illustrate that judicial action in removing criminal penalties against sexual conduct can achieve a very different result from legislative action toward the same end. Since the justification for judicial action of this kind must ordinarily be grounded in a constitutional right, decriminalization decisions by the *judiciary* are likely to move conduct from category (3) all the way across the spectrum to category (1). *Legislative* decisions to decriminalize are far less significant, because they move a given kind of conduct only from category (3) to category (2).

This characteristic of judicial action is often the result of a court's use of heightened scrutiny in reviewing legislation. For instance, the

412. *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

413. *In re Adoption of Adult Anonymous*, 106 Misc. 2d 792, 798, 435 N.Y.S.2d 527, 531 (1981). *Contra In re Adoption of Adult Anonymous II*, 111 Misc. 2d 320, 443 N.Y.S.2d 1008 (1981) (Family court in different New York county from *Adult Anonymous I* disallows adoption between adult males because no child-parent relationship would be created).

effect of locating a constitutional protection within the due process clause of the fourteenth amendment (as with finding that a constitutional right is "fundamental" for equal protection purposes) is to place the liberty so recognized almost beyond the reach of legislative regulation. This result follows from the analytical tests the Court has applied when legislation invades interests classified among the most basic of civil liberties. Thus, in *Skinner v. Oklahoma*,⁴¹⁴ a criminal statute providing for the involuntary sterilization of certain recidivist offenders was subjected to "strict scrutiny" because the power of procreation was held to be "one of the basic civil rights of man," involving matters "fundamental to the very existence and survival of the race."⁴¹⁵ Once such a right is recognized, the Court ordinarily requires the State to show something like a compelling state interest before allowing the legislation to stand. This has proved in most cases to be impossible; hence, a finding of unconstitutionality has usually followed from a finding that strict scrutiny is required. In *Roe v. Wade*,⁴¹⁶ the compelling state interest test previously used only in equal protection cases was applied to state abortion legislation under a due process analysis that categorized "a woman's decision whether or not to terminate her pregnancy" within a right of privacy protected by "the Fourteenth Amendment's concept of personal liberty."⁴¹⁷ Thus, the state's burden under either due process or equal protection versions of heightened scrutiny may be much the same.

Without delving into the various levels of higher judicial scrutiny that have been required throughout the lore of equal protection and substantive due process cases, it is sufficient to observe that most of the Court's opinions recognizing constitutional rights in the adjudication of family interests have subjected the legislation involved to more than minimal scrutiny. It is largely for that reason that these rights can be described as protected to an unusual degree, rather than being merely permitted when authorized by state or federal law.

Before exploring the tests to be employed in determining whether a particular interest should be classified in one of these highly protected categories, it is important to observe the procedural effect of the classification, because that effect shifts the burden of proof. Often, the burden of proof has thereby been shifted as a beginning

414. 316 U.S. 535 (1942).

415. 316 U.S. at 541.

416. 410 U.S. 113 (1973).

417. 410 U.S. at 153.

assumption prior to any serious analysis of the interests involved. *Roe v. Wade* illustrates the effect of the heightened scrutiny tests on difficult issues of social policy. An overriding issue in *Roe* was when life begins. If fetal life were thought to begin in the early stages of pregnancy, the obvious interests of an unborn child would have prevented the legalizing of nontherapeutic abortions. If, on the other hand, life were thought to begin at some later stage, a pregnant woman's choice about abortion could be constitutionally protected. Unfortunately, no one knew in 1973 and no one has since known — at least not in any demonstrable, objective sense — exactly when life begins. In the absence of empirical proof, an assumption had to be made about the nature of life and when it begins. The state legislatures enacting the statutes at issue in *Roe* had obviously made their own factual assumptions in favor of something close enough to life to warrant the protection of criminal laws. Under traditional minimal scrutiny tests of constitutional law, the Supreme Court would have deferred to this legislative finding of fact. In the abortion cases, however, the Court began with the premise that a pregnant woman has a constitutional right of privacy. It also assumed that the compelling state interest test applied to privacy cases. In thus classifying abortion as a privacy issue, the Court essentially shifted to the state the burden of proving the fetus was alive.⁴¹⁸ This the state could not prove, just as opposing counsel could not prove the fetus was not alive. The Court thereby made a factual assumption — in the absence of concrete evidence — that a fetus is not life. Ironically, the Court's majority opinion modestly stated it was not determining when life begins. This statement was technically correct. But letting the compelling state interest test shift the burden of proof had precisely the same practical effect as if the Court had determined there is in fact no life prior to the third trimester of pregnancy.

There are enormous implications in shifting the burden of proof from those who challenge an existing factual assumption to those who would sustain it. For one thing, it is simply not possible either

418. The Court did not expressly shift the burden to the State. An analysis of its reasoning, however, shows how such a shift took place. The Court recognized that if a fetus is a person within the meaning of the fourteenth amendment, "the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment." 410 U.S. at 156-57. Texas further contended that, even if the fourteenth amendment did not specifically apply to fetuses, "[L]ife begins at conception . . . and . . . therefore, the State has a compelling interest in protecting that life from and after conception." 410 U.S. at 159. The Court dismissed the State's claim because of the "wide divergence of thinking on this most sensitive and difficult question." 410 U.S. at 160. Uncertainty could allow a woman's decision to abort only if the burden to prove that life begins at conception fell upon the State. The Court's recognition of the State's interest in protecting potential life, 410 U.S. at 162, does not obscure the location of the burden to prove when life begins.

to prove or to disprove conclusively the individual and social risks at stake in many normative presuppositions that underlie our culture.⁴¹⁹ As a result, the placing of the burden of proof in such cases will usually determine the outcome. If that burden is placed on the state in cases that effectively define the personal relationships receiving constitutional protection, the legal meaning of "family" can be defined, just as "life" was defined in the abortion cases, not by evidence or even by analysis, but by a simple shift of theoretical assumptions that happens, somehow, automatically.

By shifting the burden of proof, the judiciary can change the most fundamental patterns of our social character with no real proof that the change will be for the better — or, in the long run, even tolerable. Changes of this kind may not only fail to follow the standard due process test of drawing upon the traditions and collective conscience of the people, but they also can completely overturn long established traditions.

[W]henver any precept of traditional morality is simply challenged to produce its credentials, as though the burden of proof lay on it, we have taken the wrong position. The legitimate reformer endeavors to show that the precept in question conflicts with some precept which its defenders allow to be more fundamental, or that it does not really embody the judgement of value it professes to embody. The direct frontal attack "Why?" — "What good does it do?" — "Who said so?" is never permissible; not because it is harsh or offensive but because no values at all can justify themselves on that level. If you persist in *that* kind of trial you will destroy all values, and so destroy the bases of your own criticism as well as the thing criticized.⁴²⁰

A presumption in favor of traditional values at least ensures that they will endure until demonstrably better alternatives can take their place.

The civil rights era gave birth to an iconoclastic mind set which

419. For example, the President's Commission on Obscenity and Pornography reached the general conclusion that the available data are simply inconclusive about the link between obscenity and criminal behavior. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 & n.8 (1973).

420. C. LEWIS, *THE ABOLITION OF MAN* 60-61 (1947) (emphasis in original). Similarly, James Hitchcock has said:

A traditional way of life is one which takes its practical authority from custom itself, from the instinctive sense of the rightness of things which a genuinely traditional community inculcates in its members. The tree can grow because its roots are not being constantly yanked out of the ground for examination. . . .

But this settled way of life is, because of the very conditions which make it possible, highly vulnerable to attack. Skepticism . . . can dissolve existing bonds with relative ease, even when it is powerless to create new ones. . . . If objections to a novel position (for example, homosexuality as merely an "alternative lifestyle") cannot be easily stated and concretely demonstrated, then it is assumed that mere prejudice governs the objectors.

Hitchcock, *Is Life a Spectator Sport*, 33 NATL. REV. 96 (1981).

demands the abandonment of traditional practices as mere prejudice unless specifiable justification is forthcoming. This attitude was expanded by the anti-authoritarianism of the late 1960's. It has found its greatest expression in the courts, because basic constitutional theory permits the judiciary to discard majoritarian traditions reflected in legislation when they threaten basic civil rights.

Given the current egalitarian momentum, the Supreme Court could, though it has thus far declined to do so,⁴²¹ adopt John Stuart Mill's principle that the state may not regulate individual conduct unless the state carries the burden of showing the conduct is demonstrably harmful. A few state courts have already done just that, often in the name of "privacy."⁴²² In that event, laws discriminating between married and unmarried persons, or laws restricting the sexual privacy of adults, could become unconstitutional simply because compelling evidence that moral permissiveness is *either* beneficial *or* harmful is so difficult to adduce. Thus, the *a priori* decision of where to place the burden of proof — not the level of evidence or even the level of theoretical analysis — will determine the outcome.

If I were to illustrate my point by drawing a cartoon, I would show a bloody and tattered lawyer standing in rags before a judge whose desk and chambers were a pile of rubble. Holding up a few shreds of paper, the lawyer would say, "*Now* I think I can show, your Honor, that those practices were harmful to society."

Of course, if our elected representatives were to change our legally defined norms through the democratic process, that would be quite another matter. The issues of proof would be no less difficult before a legislative committee than before a court. But at least the normative assumptions expressed through the legal system would be considered by a deliberative process that inherently leaves the burden of proof with those challenging the status quo. In addition, legislative change can move prohibited conduct to a permitted status without moving it all the way to a protected status. For example, a state legislature could decriminalize private fornication without giving it the hallowed status of a constitutional protection. In declaring a criminal fornication statute unconstitutional, by contrast, a court would probably rely on the right of privacy. Judicial action is, for this reason, more likely than legislative action to blur the distinction between the married and the unmarried statuses — and, hence, to blur society's definition of the family.

421. See notes 254-61 *supra* and accompanying text.

422. See note 305 *supra* and accompanying text.

This tendency of interventionist judicial action to sidestep both traditional values and normal processes of proof is a major risk in the position some take, that the judiciary should intervene when the moral consensus of society is in flux in order to permit a new moral consensus to evolve,⁴²³ or to act as the determiner of "conventional morality."⁴²⁴ It may be more than judicial flattery (though not much more) to argue that "[t]he Supreme Court is insulated from the bartering and pressures of the legislative process," which gives it the ability "to look beyond the demands of self-interested minority lobbies in an effort to discern the attitudes . . . of the moral culture at large";⁴²⁵ or that "[w]hat distinguishes courts and makes judicial protection indispensable is an institutional commitment to consistency, reason, and principle"⁴²⁶

But these assessments are as dangerous as they are naive. First of all, they assign to the Court the role of a majoritarian institution, which simply reflects the contemporary tendency to see the Court not as a "remembering or conserving" or even as a counter-majoritarian institution, but as "an innovator or pathfinder. Litigants representing today's fashionable causes know this very well indeed, which is why they are litigants in the courts rather than lobbyists before the legislatures."⁴²⁷ Furthermore, seeing the Court too easily in this role merely sings once again the sad substantive due process song of *Lochner v. New York*,⁴²⁸ because it forgets the stirring caution of Justice Holmes that

the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.⁴²⁹

It is, therefore, not the place of the Court — especially when there is no constitutional text to guide it — to be constantly seeking a "judgmental balance of shifting evidence or values"; rather, it must proceed from "virtually absolute and enduring principle[s],"⁴³⁰ that are "so rooted in the traditions and conscience of our people as to be

423. See Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

424. Perry, *supra* note 255, at 417; Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976) [hereinafter cited as Perry, *Abortion*].

425. Perry, *Abortion, supra* note 424, at 728.

426. *Developments, supra* note 10, at 1176.

427. W. BERNIS, *supra* note 57, at 233.

428. 198 U.S. 45 (1905).

429. 198 U.S. at 76 (Holmes, J., dissenting).

430. A. COX, *supra* note 409, at 114.

ranked as fundamental.”⁴³¹ In that way, the Court is the guardian of tradition, not its enemy. The following section considers criteria useful in identifying — as due process “liberty” — when such fundamental and enduring principles are truly at stake.

B. *Defining “Liberty”: Balancing the Individual and Social Interests*

As noted at the outset of this Article, the central conflict in the constitutional family cases occurs between individual and social interests in intimate relationships. A balance must be struck between these two sets of interests if we are to reach sound decisions in this area. Once heightened scrutiny is invoked, however, the analysis of compelling or other state or social interests is not very meaningful as a practical matter. The procedural consequences of heightened scrutiny in effect “decide the question in advance in our very way of putting it.”⁴³² Thus a far more crucial stage of analysis is involved in the process of determining what individual interests should be included within such conceptual sanctuaries as liberty or privacy.

Several approaches have been suggested in addressing this task. Justice Black’s “total incorporation” view⁴³³ was never adopted by a majority of the Justices. The approach of Justice Douglas to privacy, first espoused in *Griswold v. Connecticut*,⁴³⁴ which rejected substantive due process in favor of an even more vague notion of unenumerated rights, was replaced within a few years by approaches to privacy essentially synonymous with the due process liberty approach. The term “right of privacy” has nonetheless lingered, despite the similarity of its present contours to “liberty.”⁴³⁵

The Court has seldom been explicit about the tests it uses in defining the limits of privacy or liberty, nor has it provided many comprehensive and consistent statements that would identify a supporting rationale for the interests it has included in the protected sphere. This mixture of silence and ambiguity is due, in part, to the Court’s reluctance to resurrect earlier criticisms of substantive due process.⁴³⁶ It is also due, unfortunately, to a decline, ever since *Gris-*

431. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

432. Pound, *supra* note 23, at 2.

433. Black maintained that the due process clause of the fourteenth amendment incorporated all of the Bill of Rights, but only those rights. For a full expression of this theory, see *Adamson v. California*, 32 U.S. 46, 68-123 (1947) (Black, J., dissenting).

434. 381 U.S. 479 (1965).

435. See Part II F *supra*.

436. See note 15 *supra* and accompanying text.

wold, in the Court's felt need to justify its reliance on unenumerated constitutional rights. The *Griswold* opinions, including Justice Harlan's respected dissent in the related case of *Poe v. Ullman*,⁴³⁷ showed the Court struggling through a vivid demonstration of judicial restraint and painstaking analysis. In *Roe v. Wade*, by contrast, the Court's failure to articulate a reasoned justification for its resort to substantive due process unleashed a barrage of criticism — even from scholars who personally favored the results of the abortion cases — from which the Court may yet be reeling.⁴³⁸ By now, however, existing bits of reasoning can be pulled together to reach the conclusion that “[i]n the family cases, the Court has consistently turned to tradition as a source of previously unrecognized aspects of the liberty protected by the due process clauses.”⁴³⁹ This is, essentially, the Cardozo-Frankfurter-Harlan approach to substantive due process. It has also been common for the Court's more recent cases to speak in terms of a “cluster of constitutionally protected choices” related to marriage and childrearing⁴⁴⁰ that seems to draw its justification from the similarity of this subject matter to the “family” due process cases of the 1920's.

Justice Harlan formulated the best known statement of the tradition test in his dissent in *Poe v. Ullman*.⁴⁴¹ A recent student analysis

437. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting). Though Harlan was dissenting, his view of the statute in question was adopted by a majority a few years later in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

438. Much of the commentary is summarized in J. NOONAN, *supra* note 359 at 20-32.

439. *Developments, supra* note 10, at 1177 (footnote omitted).

440. *E.g.*, *Carey v. Population Servs. Intl.*, 431 U.S. 678, 685 (1977).

441. Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

In *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977), after quoting Justice Harlan's language, Justice Powell added, “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.” 431 U.S. 494, 503-04 (1977) (plurality opinion) (footnotes omitted). In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), Chief Justice Burger wrote:

The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

406 U.S. at 232. One of the most widely cited earlier tests for defining “liberty” came from the

of the test illustrates some of the problems of interpreting it.⁴⁴² The analysis suggests, for instance, that “the Court will not recognize . . . traditional values” the continued viability of which “has been seriously questioned.”⁴⁴³ The contemporary attitude of “seriously questioning” virtually all traditional values is sufficiently widespread that this qualification should not be taken too seriously until it has been identified, much less relied upon, by the Court. The notion of continued viability does point to the limitations of a tradition-oriented approach, however, since the Court is not likely to find ultimate values in a tradition as objectionable as, say, racial prejudice.

There are also inherent difficulties in knowing just what is traditional about a tradition. One commentator has said that: “The Court must determine what characteristics of a traditional value render it of constitutional import; it may then adopt a functional approach to the right letting its rationale dictate its scope.”⁴⁴⁴ This description leaves considerable latitude, however, for defining both “value” and “functional” approaches. One might conclude from the marriage and family cases, for instance, that intimate human association is the traditional value, and that such functional equivalents⁴⁴⁵ as cohabitation or communal marriage should therefore be protected. Illustrating further, many would today assume that the core value protected by the Constitution and our traditions is individual autonomy. Thus, any infringement on personal autonomy could be viewed as invading a traditionally protected value. The obvious weakness of this approach is that it neglects the need to weigh social or other competing interests — even if they have also been traditionally recognized — until a nearly irrebuttable presumption has already been created against any interest competing with individual autonomy.

Louis Henkin identified the glaring need for the privacy cases to adopt a test that weighs “the public goods that compete with ‘pri-

debates on whether the fourteenth amendment incorporated all, or only the most preferred, of the Bill of Rights guarantees. Defending the “selective incorporation” approach, Justice Cardozo said that “liberty” should include only those safeguards that are

of the very essence of a scheme of ordered liberty. To abolish them is . . . to violate a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Snyder v. Massachusetts*, [291 U.S. 97, 105 (1934)] . . .

. . . If the fourteenth amendment has absorbed [these liberties], the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.

Palko v. Connecticut, 302 U.S. 319, 325-26 (1937) (citations omitted).

442. See *Developments, supra* note 10, at 1177-87.

443. *Id.* at 1179, 1180 & n.134.

444. *Id.* at 1181 (footnotes omitted).

445. See note 84 *supra* and accompanying text.

vacy' in these cases."⁴⁴⁶ This is the same analytical step sought by Pound's attempt to place the individual and social interests on "the same plane" during at least some stage of the inquiry.⁴⁴⁷ Such a weighing process

has never received refined scrutiny . . . in applying the Bill of Rights; in the Privacy cases, it has had hardly any scrutiny at all. . . .

Especially now that we have added a new, expandable zone of autonomy, fundamental but not absolute, a jurisprudence of balancing of rights and goods cries for thinking about public goods.⁴⁴⁸

While such comparisons may prove difficult, this difficulty does not justify ignoring the public goods that compete with privacy. The Court's primary business, after all, is making difficult choices between conflicting values.

Indeed, the Court's work in such other contexts as the Bill of Rights has developed a sufficient methodology to weigh individual and social interests that the analogy to those cases produces an extremely helpful insight in understanding the unarticulated analytical premises for defining "liberty" in the Court's family cases. For example, in determining which elements of the Bill of Rights should be binding on the states by incorporation into the due process clause of the fourteenth amendment, the Court has in recent years "displayed a preference for justifying its actions in terms of explicit provisions of the Constitution or *plain implications of a democratic form of government*."⁴⁴⁹ Thus, in *Duncan v. Louisiana*,⁴⁵⁰ the right of trial by jury in criminal cases was held to be within the meaning of due process "liberty" because it is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions";⁴⁵¹ but more specifically, trial by jury contributes to the ends of a free society because peer determinations "prevent oppression by the Government."⁴⁵² If a judge has "plenary power," governmental authority is "unchecked."⁴⁵³

The history of first amendment adjudication also makes it very clear that more is at stake in identifying the root policies of preferred constitutional freedoms than merely minimizing governmental inter-

446. Henkin, *supra* note 306, at 1430.

447. See note 23 *supra* and accompanying text.

448. Henkin, *supra* note 306, at 1430.

449. Heymann & Barzelay, *supra* note 71, at 781 (emphasis added).

450. 391 U.S. 145 (1968).

451. 391 U.S. at 148 (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (quoting *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926))).

452. 391 U.S. at 155 (footnote omitted).

453. 391 U.S. at 156.

ference with individual autonomy. Free speech has enjoyed a special status in large part because of the relationship of unrestrained discourse to the underlying political theory of democracy. Some significant aggregate end in an open society is preserved by making the boundaries of permissible speech and association in the *ideological* marketplace as wide as possible. For example, the freedom of association is important enough to be binding on the states through the fourteenth amendment in part because association is important to effective advocacy of public and private points of view, whether political, economic, religious, or cultural.⁴⁵⁴ Justice Stewart has also noted that the exalted status of freedom of association was designed only to protect such "ideological freedom" as "the promotion of speech, assembly, the press, or religion";⁴⁵⁵ it was never intended to protect associations based on "no interest other than the gratification, convenience, and economy of sharing the same residence."⁴⁵⁶

An even more vivid illustration may be found in the Court's well established approach to obscenity, which has not been entitled to first amendment protection because obscenity does not contribute to the ultimate ends of a democratic society, despite its obvious character as a form of speech. "[T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom."⁴⁵⁷ To say that obscenity has not "the slightest redeeming social importance"⁴⁵⁸ is, therefore, not only a way of trying to define obscenity; perhaps more importantly, it is a way of saying that extraordinary constitutional freedoms are preferred in no small part because they promote matters of *social* value as well as promoting individual liberty.

The elimination of racial discrimination has taken on the highest possible priority not only because discriminatory laws have the effect of reducing individual liberty, but also because an overall pattern of racial discrimination impairs full participation by disadvantaged classes in the nation's economic, social, and political processes. The Court's historic concern with school desegregation, for example, reflected a strongly held belief about the relationship between educa-

454. NAACP v. Alabama, 357 U.S. 449, 460 (1958).

455. Moore v. City of E. Cleveland, 431 U.S. 494, 535 (1977) (Stewart, J., dissenting).

456. Moore v. City of E. Cleveland, 431 U.S. 494, 536 (Stewart, J., dissenting).

457. Miller v. California, 413 U.S. 15, 34 (1973). See also notes 369-80 *supra* and accompanying text, which address the relationship between the Court's rejection of first amendment protection for obscenity and the Court's failure to extend the right of privacy to sex outside marriage.

458. Roth v. United States, 354 U.S. 476, 484 (1957).

tion and participation in American society.⁴⁵⁹ A democratic society seeks equality among its citizens as the standard in providing opportunity for economic and political participation, social contribution, and individual growth. Those affirmative opportunities go well beyond a concern with negative restrictions on personal autonomy. Indeed, the constitutionally approved remedies often restrict autonomy as severely as did the discriminatory practice itself.

The relationship between the individual and social interests is reflected in Roscoe Pound's view that:

When the legal system recognizes certain individual rights, it does so because it has been decided that society as a whole will benefit by satisfying the individual claims in question; for example, when the legal system guarantees the individual freedom of speech, it advances society's interest in facilitating social, political, and cultural progress. This interest . . . is more important than society's interest in preserving existing institutions.⁴⁶⁰

This same relationship underlies Louis Henkin's concern that in the privacy cases, the balance between private rights and public goods "has had hardly any scrutiny at all."⁴⁶¹ The Court's failure explicitly to articulate this balance in its analysis of the family cases is unfortunate, because only in thoughtfully assessing "the public goods that compete with 'privacy' in these cases" will the Court find any rational way of distinguishing which private conduct should be within and which should be beyond the reach of constitutional protection.⁴⁶²

This Article submits that the "family" relationships deserving constitutional protection as substantive liberty interests under the due process clause may be identified by the same view of social interest as that used in the doctrine of selective incorporation, in defining the scope of first amendment freedoms in obscenity cases, and in other similar contexts: the extent to which protection of the interest furthers the ends of a democratic society. It is assumed, of course, that a highly significant individual liberty interest would also be

459. Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

460. Auerbach, *supra* note 24, at 208.

461. Henkin, *supra* note 306, at 1430.

462. *See id.* at 1429-33. For a discussion of misconceptions that have arisen from viewing "privacy" in a broad sense as a source of constitutional rights in a day of space-age technology, see notes 302-07 *supra* and accompanying text.

identified. When the legal system thus protects such relationships as kinship and formal marriage, it advances not only the immediate individual interests involved, but society's interest in social and political structures that sustain long-term individual liberty. As developed more fully in Part I, *supra*, the structure of marriage and kinship responds to that social interest by maximizing the interest of children and society in a stable family environment; by ensuring a socialization process and an attitude toward personal obligation that maximizes democracy's interest in the voluntary "public virtue" of its citizens; by maintaining marriage and kinship as legally recognizable structures that mediate between the individual and the State, thereby limiting governmental power; and by maintaining sources of objective jurisprudence that will ensure stable personal expectations and encourage generality of laws, thereby minimizing the arbitrary power of the State. In these ways, the structure of formal family life emphasizes that sense of "ordered liberty"⁴⁶³ necessary to achieve individual liberty as a *long-range* objective. Anarchy maximizes individual liberty in the extreme, but only in the short run. It has been correctly observed that "the greatest failure of the individualistic approach to human rights has been the inability to recognize how an ardent concern for freedom, understood in a particular way, can itself contribute in the long run, to the undermining of freedom."⁴⁶⁴ The formal family aids our quest for long-run liberty. That is why the Constitution does, and should, protect it.

The extent to which an asserted legal interest may further the ends of a democratic society should be weighed, in the process of constitutional analysis, at the time the Court is determining whether the nature of the interest qualifies it for the protection of heightened scrutiny. At this stage, the Court is neither deferring to nor doubting a legislative judgment; rather, it seeks only to identify the nature of the interest at stake. Once that step has been taken, and if heightened scrutiny is thereby invoked, consideration can then be given the State's interest in regulating the protected interest in the manner employed by the legislative enactment in question. That process of reasoning has underlain the Court's approach to defining the scope of first amendment protection and the scope of the incorporation doctrine under the fourteenth amendment. The Court's approach to defining privacy as part of due process liberty (or, preferably, leaving

463. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

464. Hitchcock, *Beyond 1984: Big Brother Versus the Family*, *HUM. LIFE REV.*, Winter 1980, at 54, 56.

aside confusing references to privacy⁴⁶⁵ and speaking simply of liberty interests in the family) should follow the same pattern. When this is done, the individual and social interests can initially be compared "on the same plane" so that the very decision to categorize one claim as "individual" and the other as "social" or as a "state interest" does not cause the Court to "decide the question in advance" by its "very way of putting it."⁴⁶⁶

This method of analysis is dictated not only by analogy to other contexts of constitutional adjudication, but also by the inherent process of defining due process liberty. Thus, Justice Harlan's understanding of the "purposes" and "traditions" behind the preferred legal status of marriage led him to *include* marriage within due process liberty just as that same understanding led him to *exclude* "adultery, homosexuality, [and] fornication . . . however privately practiced."⁴⁶⁷ This analytical step was taken in defining the nature of "liberty" interests. The *next* analytical step would consider whether the specific State interest at issue in the case justifies any invasion of the preferred form of "liberty."

C. *Policies That Compete with Family Liberty: A Perspective on "Protected" and "Permitted" Interests*

Explicit use of the analytical model suggested in the preceding section would not have altered the outcome of most of the Supreme Court's family cases. For the most part, the Court has reacted intuitively to the limits on personal autonomy naturally intimated by deeply rooted social interests. Still, more explicit analysis is vital to the articulation of a coherent rationale that will guide future cases and lower courts. The number of cases in which social and individual interests conflict in family-related cases is likely to increase, given the existing social and legal momentum.

Many courts and legislatures have begun to recognize compelling claims that would once have been denied by rigid policies that favored formal marriage above all competing interests. These developments are not generally the result of deliberate antipathy toward marriage or family values. Rather, in each circumstance, decisions have been made to advance important policy interests deserving legal protection, despite the conflict between those interests and the policy favoring formal family ties. As recognition of such interests

465. See notes 307-08 *supra* and accompanying text.

466. Pound, *supra* note 23, at 2.

467. *Poe v. Ullman*, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting).

has increased, the policy preference for marriage has inevitably appeared to diminish and even "wither."⁴⁶⁸ Marriage cannot realistically be expected to take such priority that all competing interests must forever go unrecognized, even though the law continues to recognize marriage as the "foundation of society." Thus, many of the recent developments may be long overdue.

At the same time, a proper perspective is needed to make clear that even as other interests make relative gains, the interest in marriage and kinship can have its own ultimate priority as represented by constitutional protection. To develop such a perspective, consider once again the distinctions between "protected," "permitted," and "prohibited" conduct.⁴⁶⁹ Uncertainty about the meaning of the constitutionally protected category is created when claims in the middle category of permitted conduct must be balanced against claims in the protected category. Increasingly common — and increasingly important — cases of this kind arise when permitted rights such as welfare entitlements or employment rights are affected by policies that express the state's preferred desire to support formal marriage. If the protected status of marriage were always given preference, many just claims would remain unsatisfied. Ignoring compelling claims can be understandably troublesome, when, for example, the state has tried indirectly to prohibit extramarital sexual behavior using methods that have only a tenuous relationship (or less) to the state objective.⁴⁷⁰ As a result of such trade-offs, without any direct change in the constitutional status of either marriage or material entitlements, "both marriage and the legitimacy of parentage have declined in importance as determinates of material benefits."⁴⁷¹

468. Glendon, *supra* note 119, at 663. Such changes in legal policy in the United States in many cases reflect "a long historical process" throughout the Western democracies "that has effected a fundamental alteration in the relative social and economic importance of family, work and government as determinants of wealth, standing, self-esteem and economic security." M. GLENDON, *supra* note 77, at 2.

469. See text at notes 409-10 *supra*.

470. A court deciding that private sexual behavior is constitutionally protected might hold a sex law unconstitutional but condone discriminatory hiring practices, or vice versa, because different ranges of government interests are involved. The court might find, for example, that there is a legitimate and sufficient state interest in promoting marriage or discouraging immorality to justify a law criminalizing private sexual behavior. But if that court viewed a refusal to hire a homosexual as nothing but a punishment for the same behavior, the court might conclude that the civil disability was not sufficiently related to the state's goal, since that goal is adequately and more directly served by the criminal law. Conversely, the court might hold the criminal law unconstitutional as not sufficiently related to any legitimate state interest but condone a refusal to hire a homosexual as a teacher, since the state's interest in the latter context could be viewed as permissible and more substantial.

Note, *supra* note 32, at 727.

471. Karst, *supra* note 11, at 648. See generally Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125 (1981); Fineman, *Law and Changing Patterns*

A number of permitted interests may cause courts to limit the protection traditionally afforded to the formal family. It is instructive to observe the effects of this phenomenon in situations where a particular legal policy has demanded — and sometimes taken — something from the status of marriage as the price for upholding its own valid interest. In the illegitimacy cases, for example, the Court has tended to find that children born out of wedlock should not be punished by state policies designed to discourage illicit sex — not because such policies are beyond the state's authority, but because the punishment of innocent children is both an ineffective and unfair means of pursuing the state policy. The interests of illegitimate children have been deemed significant enough in these cases to rise to the status of their own specially protected constitutional position.⁴⁷²

For reasons also related to the economic welfare of illegitimate children, the Court has — without giving protected constitutional status to the right to receive welfare aid — invalidated state regulations that denied welfare assistance to the children of cohabiting parents.⁴⁷³ In response to state claims that regulations of this kind were justified by an interest in discouraging illicit sexual relationships and illegitimate births, the Court acknowledged that the state could regulate illicit sex and illegitimacy, but not by the device of absolutely disqualifying needy children. The Court found that protection of dependent children was the paramount goal of the welfare assistance, accepting as inevitable the reality that “there is no existing means by which Alabama can assist the children while ensuring that the mother does not benefit.”⁴⁷⁴ The Supreme Court's intervention in these cases has clearly resulted from its concern about the urgent economic dependency of illegitimate children in poverty-class households, not from judicial indifference to marital status.

There has been a growing policy interest in tort law in compensating the victims of tortiously caused injuries. This interest competes both with the common law's historic fear of unlimited liability and with the law's traditional preference for protecting only the closest relational interests. The restricting of many tort claims to persons related by marriage or kinship has been one important way of resolving the policy tensions. However, at least one federal court has

of Behavior: Sanctions on Non-Marital Cohabitation, 1981 WIS. L. REV. 275; Glendon, *supra* note 119.

472. See Part II A *supra*.

473. *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (per curiam); *King v. Smith*, 392 U.S. 309 (1968). Both cases were decided by using the rational basis test.

474. *King v. Smith*, 392 U.S. 309, 335 n.4 (1968) (Douglas, J., concurring).

recently expanded the action for loss of consortium to include the claim of an unmarried cohabitant,⁴⁷⁵ even though similar consortium claims have not been allowed elsewhere,⁴⁷⁶ nor have the courts generally recognized the claims of nonmarital partners in wrongful death actions.⁴⁷⁷ The court was moved by its acceptance of an overriding policy of extending tort actions to compensate injured parties, and was not deterred by the subjectivity of evaluating the nature of a consortium interest between unmarried cohabitants.⁴⁷⁸

The celebrated *Marvin v. Marvin* case⁴⁷⁹ is the result of emphasizing the *contractual* rights of cohabiting couples, not of equating cohabitation with marriage. Michelle Marvin was held to enjoy none of the rights of marital partners under California community property laws, because the court did not regard Lee and Michelle as a "family" within the meaning of California's Family Law Act. The *Marvin* court took pains to point out that, "Lest we be misunderstood, . . . the structure of society itself largely depends upon the institution of marriage, and nothing we have said . . . should be taken to derogate from that institution."⁴⁸⁰ Moreover, the court may well have intended to encourage formal marriage by removing the financial incentives for cohabiting without marriage.⁴⁸¹ Other courts have reached an even more cautious conclusion about *Marvin*-like fact situations, not because they believe the policy preference for marriage prevents cohabitants from entering into *any* contracts,⁴⁸² but because they believe a strong (category 1) preference for marriage could be undermined if the courts allow implied contractual claims (category 2) to arise from merely living together.⁴⁸³ The question of allocating policy priorities between upholding the insti-

475. *Bulloch v. United States*, 487 F. Supp. 1078 (D.N.J. 1980); see also Comment, *Extending Consortium Rights to Unmarried Cohabitants*, 129 U. PA. L. REV. 911 (1981); Comment, *Loss of Consortium and the Unmarried Cohabitant*, 1981 B.Y.U. L. REV. 437.

476. See, e.g., *Chiesa v. Rowe*, 486 F. Supp. 236 (W.D. Mich. 1980); *Sawyer v. Bailey*, 413 A.2d 165 (Me. 1980).

477. See, e.g., *Vogel v. Pan Am. World Airways, Inc.*, 450 F. Supp. 224 (S.D.N.Y. 1978).

478. See *Bulloch v. United States*, 487 F. Supp. 1078 (D.N.J. 1980). The facts were especially compelling — the couple had been previously married and divorced. They had intended to remarry, but believed they could not do so in view of the injury which became the subject of the lawsuit. Ordinarily, the very lack of a long-term commitment that characterizes cohabitation would make the valuation of a loss of consortium claim impossible to fix.

479. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1977), *modified*, 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (1981) (deleting rehabilitative award to plaintiff).

480. 18 Cal. 3d at 684, 557 P.2d at 122.

481. See Beck, *Nontraditional Lifestyles and the Law*, 17 J. FAM. L. 685, 690 (1978-79).

482. Contracts are generally permitted when they concern "independent" matters and sexual relations are not part of the consideration. RESTATEMENT OF CONTRACTS §§ 587, 597 (1932); 6A A. CORBIN, CORBIN ON CONTRACTS § 1476 (1962).

483. *Hewitt v. Hewitt*, 77 Ill. 2d 49, 58, 394 N.E.2d 1204, 1207 (1979) ("Of substantially

tution of marriage and recognizing freedom of contract is — as with so many other policy conflicts — a judgment question. As the *Marvin* case illustrates, the contemporary climate has allowed contractual interests to gain somewhat in that process.⁴⁸⁴ It is not accurate to infer, however, that, as a result, cohabitation has moved from a “permitted” to a “protected” status by the recognition of contractual rights.

The law of evidence has also established, over the years, certain rules designed to protect and uphold the confidential relationship of husband and wife. Competing against that interest has been an interest in securing all relevant testimony in litigation. Both interests were recently weighed by the Supreme Court in reaching the conclusion that a spousal privilege should not bar the voluntary testimony of one spouse against the other concerning nonconfidential matters.⁴⁸⁵ The broad sweep of the prior testimony rule (requiring both spouses to consent and covering nonconfidential subjects)⁴⁸⁶ was narrowed on the grounds that it impinged unnecessarily on the public’s “right to every man’s evidence”⁴⁸⁷ and that the ancient idea justifying the privilege (notions of self-incrimination arising from the common law’s view of legal unity between husband and wife) was long since outmoded. The court did stress the importance of “marriage, home, and family relationships — already subject to much erosion in our day,”⁴⁸⁸ but concluded that no other testimonial privilege covers nonconfidential communication and that “when one spouse is willing to testify against the other in a criminal proceeding . . . there is probably little in the way of marital harmony for the privilege to preserve.”⁴⁸⁹ Predictably, even before this case, the current climate had provoked consideration of whether the spousal evi-

greater importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage.”).

484. A federal district court recently held that, because a *Marvin*-type suit between unmarried cohabitants was strictly a *contract* action, federal jurisdiction over the suit was not barred by the recognized domestic relations exception to federal diversity jurisdiction. *Anastasi v. Anastasi*, 532 F. Supp. 720, 725 (D.N.J. 1982). On the other hand, the California Supreme Court is not willing to allow a prison inmate to receive overnight visits from a woman not recognized as his lawful wife, because the state law authorizing such visits by persons related through blood, marriage, or adoption intends only to preserve “family unity.” *In re Cummings*, 30 Cal. 3d 870, 873, 640 P.2d 1101, 1102, 180 Cal. Rptr. 826, 827 (1982).

485. *Trammel v. United States*, 445 U.S. 40 (1980).

486. *Hawkins v. United States*, 358 U.S. 74 (1958).

487. *Trammel v. United States*, 445 U.S. 40, 50 (1980).

488. *Trammel v. United States*, 445 U.S. 40, 48 (1980).

489. *Trammel v. United States*, 445 U.S. 40, 52 (1980). However, the purpose of the privilege is to protect confidentiality at the time of the *conversation*, when there may be more to preserve than at the time of the testimony.

dentiary privilege should be extended to unmarried cohabitants.⁴⁹⁰

The whole range of divorce-related issues, such as alimony, property settlement, and child custody presents another fertile field for conflict over the legal preference that should be given to formal marriage. The conflict has arisen most pointedly when the custodial spouse is found to be cohabiting with another person, sometimes homosexually. The issue also arises when one spouse claims the other should no longer receive alimony because the other spouse is cohabiting with another person.⁴⁹¹ The movement in recent years has been away from rigid assumptions and toward a more pragmatic approach that does not automatically equate cohabitation with either marriage or "immoral" conduct. As in the illegitimacy cases, legal and social policy would obviously prefer that the custody of children could always be assigned to two stable, married parents. Support for the marital institution would dictate a similar preference. However, the choices more frequently focus on the "least detrimental available alternative"⁴⁹² among two or more unattractive possibilities. Under those circumstances, cohabitation is only one of a number of factors. Some courts have judged its relative importance to be very high,⁴⁹³ while others have declined to adjust custody on "moral climate" grounds without clear proof of harm to the children.⁴⁹⁴

Society's current interest in sex discrimination has also led to considerable reexamination of statutes and common law rules based on sex-role stereotypes. Even the changes that have occurred, however, do not warrant the uncritical assumption that all sex-discrimination legislation is designed to remove all distinctions based on marital status. Some judges have missed that point. For example, the D.C. Circuit Court of Appeals held recently that a federal equal credit opportunity law gave an engaged — but unmarried — couple

490. See Comment, *The Husband-Wife Evidentiary Privilege: Is Marriage Really Necessary?*, 1977 ARIZ. ST. L.J. 411.

491. *E.g.*, *Mitchell v. Mitchell*, 418 A.2d 1140, 1142-43 (Me. 1980); *Myhre v. Myhre*, 296 N.S.2d 905, 907-09 (S.D. 1980).

492. The phrase is from J. GOLDSTEIN, A. SOLNIT & A. FREUD, *supra* note 39, at 53.

493. *E.g.*, *Jarrett v. Jarrett*, 78 Ill. 2d 337, 400 N.E.2d 421 (1979) (cohabiting divorcee loses custody because of potential injury to moral well-being and development of children), *cert. denied*, 449 U.S. 927 (1980); *S. v. S.*, 608 S.W.2d 64 (Ky. 1980) (potential — not actual — harm to child from mother's lesbianism sufficient to warrant change of custody), *cert. denied*, 451 U.S. 911 (1981); *M.J.P. v. J.G.P.*, 640 P.2d 966, 968-69 (Okla. 1982) (psychiatrist's testimony that child in custody of cohabiting lesbian mother would face inevitable and serious trauma persuaded court to change custody to father). See generally Case Note, *Modification of Child Custody Predicated on Cohabitation of the Custodial Parent*, 1981 B.Y.U. L. REV. 169 (analysis of the *Jarrett* case.)

494. See *In re Burrell*, 58 Ohio St. 2d 37, 388 N.E.2d 738 (1979); *Schuster v. Schuster*, 90 Wash. 2d 626, 585 P.2d 130 (1978).

the right to aggregate their incomes in determining creditworthiness in a joint mortgage application.⁴⁹⁵ By basing its decision on the notion that the subject federal law forbade any discrimination on the basis of marital status, the court may have established a precedent for requiring financial institutions to aggregate the claims of all unmarried couples, whether communal, homosexual, or otherwise. It has been observed that if the two plaintiffs in the case had been married — but not to each other — the defendant firm would still have refused to aggregate their incomes, because there was no marital *relationship* between the two of them.⁴⁹⁶ The legislative history reveals that the law's entire intent was only to remove discrimination against individual women in obtaining credit.⁴⁹⁷ Logic also suggests that the likely duration of a relationship should be a factor in determining the creditworthiness of an association between two people. The court ignored both of these factors, and also failed to see in its decision any implications for the institution of marriage. This case illustrates that concerns with sex discrimination can be uncritically translated into a broad mandate for equating the statuses of married and unmarried couples — a problem very different from sex discrimination. When Congress or state legislatures wish to begin treating unmarried couples as a disadvantaged class for purposes peculiar to that class, that will be soon enough to challenge the protected status of marriage. In the meantime, the potent legal weapons of anti-sex discrimination laws are best reserved for their intended purposes.

There is also a large category of problems that would fit under such headings as decriminalization and victimless crimes. Without attempting to address that large subject, it should at least be noted in passing that in the last fifteen years, twenty-one states have altogether repealed their laws prohibiting homosexual activity by consenting adults. Another thirteen states have reduced the crime from a felony to a misdemeanor.⁴⁹⁸ Fornication is a crime today in only fifteen states and the District of Columbia.⁴⁹⁹ Of equal importance, even the states that have fornication laws rarely enforce them. At the same time, some states have “fiercely resisted” decriminalization and “stringent penalties for sodomy are the rule rather than the ex-

495. *Markham v. Colonial Mortgage Serv. Co.*, 605 F.2d 566 (D.C. Cir. 1979).

496. Note, *Protection of Unmarried Couples Against Discrimination in Lending Under the Equal Credit Opportunity Act*, 93 HARV. L. REV. 430 (1979).

497. *See id.* at 434.

498. Grey, *supra* note 10, at 95 n.67; H. CHASE & C. DUCAT, CONSTITUTIONAL INTERPRETATION 1156 (1979).

499. The statutes are summarized in Note, *supra* note 411, at 254.

ception" when enforcement is undertaken.⁵⁰⁰ In general, much of the support for decriminalization of sex crimes "has been based on practical concerns" relating to enforcement difficulties, "not on any notion that sexual freedom is a human right."⁵⁰¹ Thus, relaxed attitudes toward the enforcement of sex crimes do not mean that sexual privacy outside marriage is in a protected position. And even if legislative decriminalization were to take place on a larger scale, that would only move nonmarital sex to a permitted category, not a protected one.

Other movements in the law have also tended to diminish the place of formal marriage as the price of upholding other competing interests.⁵⁰² For instance, the divorce reform movement, which began by distinguishing between personal fault and actual breakdown of a marriage, has now created in some states the practical right of unilateral marriage termination. In unilateral action, the interests of the marital partner and the interests of children are likely to receive reduced levels of consideration.

This abbreviated sketch has summarized a number of important legal policies that have been the subjects of increased judicial, and sometimes legislative, attention in recent years: policies favoring welfare entitlements for the needy — especially children; the interest of tort law in compensating the victims of actual losses; the interest of contract law in maximizing freedom of contract; the policy favoring maximum information in evidentiary rules; the preserving of existing child-parent relationships in deciding between imperfect custodial parents; increased emphasis in eradicating sex discrimination; movements to decriminalize sex crimes; and the divorce reform movement. It is significant that, except for the equal protection issue in the illegitimacy cases, none of the policy interests mentioned here draws its strength from a position of preferred constitutional status.

500. Note, *supra* note 32, at 738.

501. Grey, *supra* note 10, at 95. Lord Patrick Devlin, one of the best-known defenders of society's right to enforce its collective moral judgments, is inclined to agree: "Adultery of the sort that breaks up marriage seems to me to be just as harmful to the social fabric as homosexuality or bigamy. The only ground for putting it outside the criminal law is that a law which made it a crime would be too difficult to enforce; it is too generally regarded as a human weakness not suitably punished by imprisonment." P. DEVLIN, *supra* note 194, at 22. The privacy concerns affecting enforcement of sex crimes are discussed more fully in Part II F *supra*.

The repeal of an anti-sodomy statute while a teacher dismissal case was still pending was held not to "relieve the conduct of its immoral status" in *Gaylord v. Tacoma School Dist.* No. 10, 88 Wash. 2d 286, 297, 559 P.2d 1340, 1346, *cert. denied*, 434 U.S. 879 (1977). The existence of sex crime statutes has generally not been a prerequisite to the dismissal of public school teachers for lewd or immoral conduct. *See generally* Annot., 78 A.L.R.3d 19 (1977).

502. *See generally* Glendon, *supra* note 119.

Similarly, few of these interests are in the "prohibited" category. Most are simply "permitted" interests that compete in an infinite variety of circumstances with other interests. The constitutionally "protected" status of marriage and kinship still remains in a uniquely favored position. As has been demonstrated, the preservation of that protected status is based on policies applicable to formal family interests that do not apply to other interests, even though for more limited "permitted" purposes such other interests may be valid.

Nevertheless, the recent growth of interests that compete with marriage may be regarded as a threat to the continued existence of marriage as a preferred status. The policies of social interest that seek to uphold formal family ties are having increasing difficulty defending themselves against an emerging set of legal concepts whose most potent powers are now reserved for the enforcement of equal individual rights. Furthermore, the legal system has always had difficulty enforcing affirmative duties, the discharge of which is vital to the maintenance of family relationships. Thus the formal family's chief source of protection may be the willingness of the judiciary to restrain itself in creating even more exceptions to the policies that support a general sense of obligation in family relationships. There is otherwise no single institution in our system responsible to determine when the cumulative effect of so many exceptions to a protected marriage preference policy finally becomes so dominant that the marriage policy is, for most practical purposes, overwhelmed. When the law relaxes enough indirect supports for the formal family, formally based family life is left unprotected and vulnerable to the eroding momentum of an incessant individualism. When that happens, even those sympathetic to the removal of arbitrary limits on personal liberty register concern:

U.S. law, from its beginnings, has favored the traditional family for its critical role in the nurture of future generations. Even those who oppose discrimination against homosexuals may question the wisdom of giving gay families the same support.⁵⁰³

The Supreme Court's extension of constitutional protection to marriage and kinship, while denying that protection to sexual privacy among the unmarried, is consistent with a general posture of support for the formal family. A clearer understanding of that position and the policies that sustain it, as suggested in Parts I and II, could clarify the meaning of family ties and the social purposes served by them. Such understanding might encourage the judicial self-restraint necessary to sustain marriage as the "foundation of society."

503. *And Now Gay Family Rights?* TIME, Dec. 13, 1982, at 74.

CONCLUSION

The individual tradition and the family tradition, both historically at the heart of American culture, are the products of two very different heritages, both conceptually and historically. In the past, the two traditions have been mutually reinforcing; now, however, they may be on such a collision course as to become mutually exclusive. A comment on the origins and intentions of the two traditions may provide some perspective in seeking to restore the necessary compatibility between them.

Sir Henry Maine's celebrated generalization about the long sweep of history from Status to Contract offers one way of comparing the roots of the two traditions. Reaching back to the earliest stirrings of recorded history, Maine wrote that the family antedated the individual as the primary unit of which both the law and society took account:

[S]ociety in primitive times was not what it is assumed to be at present, a collection of *individuals*. In fact, and in the view of the men who composed it, it was *an aggregation of families*. The contrast may be most forcibly expressed by saying that the *unit* of an ancient society was the Family, of a modern society the Individual.⁵⁰⁴

Since that time, "The movement of the progressive societies has . . . been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The individual is steadily substituted for the Family, as the unit of which civil laws take account." And as the law has reflected this development, the tie which replaces the "reciprocity in rights and duties" of the family has come to be "Contract." Hence, "we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract."⁵⁰⁵

Nevertheless, some vestiges of the ancient concept of Status have continued, as both the law and society still assume that people who enter "the *order* of matrimony" or become mothers and fathers take upon themselves a form of Status that confers a set of rights and obligations having an almost timeless kind of meaning.⁵⁰⁶ Nobody needed to explain to the worldwide television audience just what Prince Charles and Lady Diana were doing in 1981 on that summer day at St. Paul's, exchanging vows in a ritual older than their royal

504. H. MAINE, *supra* note 52 (emphasis in original).

505. *Id.* at 163-65 (emphasis omitted).

506. For a discussion of marriage as a status construct, in the context of various interpretations, see Hunter, *An Essay on Contract and Status: Race, Marriage, and the Meretricious Spouse*, 64 VA. L. REV. 1039, 1067-76 (1978).

pedigree. Nobody needed to explain, or hire a lawyer to draft a careful agreement to cover the details, when a dying man said to his mother while gesturing to his friend, "Woman, behold thy son;" and to his friend, "Behold thy Mother." The ancient concept of Status told them what to do. "And from that hour," the friend "took her unto his own home."⁵⁰⁷

Because Status, with its origins in the Family, predated the Revolutionary Era, it is not surprising that local American laws governing the family "predated not only the writing of the Constitution and the Declaration of Independence," but also predated the statement of the "new political principles" by the likes of Locke and Hobbes on which our constitutional theory was based.⁵⁰⁸ Those "new political principles" were, of course, grounded fully in concepts of Contract, including the right of revolution for "breach of contract" and the right of society to enter into yet a new Social Contract in the form of a Constitution.

At the time the Constitution was created, there was a clear distinction between the individual tradition and the family tradition. Drawing on terms first used by De Tocqueville, Walter Berns has written that the individual tradition was in the realm of "political legislation," which was embodied in the Constitution and was informed by the democratic *political* rights expressed in the Declaration of Independence. Political legislation stressed the natural equality of all men "so far as political right is concerned."⁵⁰⁹ Thus, the new political principles rejected centuries of abuse of aristocratic Status as a political and economic construct. In this state of individualistic equality, it was assumed that men would be "calculating, fear-motivated . . . individuals, not directed toward others . . ."⁵¹⁰ "Vigorous pursuit of individual self-interest turned out to be the guiding and energizing principles of the community."⁵¹¹

Meanwhile, however, the domestic realm had not been included in the *political* legislation. It remained, rather, in what De Tocqueville called the "*civil* legislation," which comprised the law enforced in state courts, including the laws governing the family. These laws, which predated the creation of the Constitution, continued to regulate the duty of family members to support one another;

507. *John* 19:26-27.

508. Address by Walter Berns to the Philadelphia Society 12 (Apr. 11, 1981) (on file with the *Michigan Law Review*).

509. *Id.* at 11.

510. *Id.* at 13 (quoting Alan Bloom).

511. Horwitz, *supra* note 54, at 133.

the right of a father to an action against one who, by debauching his daughter, brought disgrace upon the family; and the rule providing that one spouse could not testify against the other, in the interest of domestic harmony.⁵¹² Many of the duties imposed by the civil law upon family members derived from a "law of morality," which also had obvious links to a social interest that sought to provide for the protection of dependent persons, and to secure "to all individuals a moral and social life" as well as to ensure the "rearing and training of sound . . . citizens for the future."⁵¹³ Clearly, the family law doctrines that evolved through custom and the common law, prior to the Constitution both in time and in theory, were concerned with marriage not only as "the most important relation in life," but also as "the foundation of the family and of society."⁵¹⁴ Hence, society's right to concern itself with the social interest in marriage may be among the most obvious and the most important of the rights and powers retained by "the people" and "the States" under the ninth and tenth amendments. The silence of the Constitution on the entire subject of the family does not tell us that marriage and family were unimportant to the founders; it tells us, rather, that the Founders consciously accepted the regulation of family life embodied in the civil legislation. They did not view individual rights arising from family relationships — though there were many — as political liberties needing protection by the Bill of Rights.

The customary and common law traditions of Status on which domestic relations law rested did not derive from the same premises of self-interest inherent in the natural rights doctrines that fueled the political and economic individualism of the nineteenth century. Rather, in abrupt contrast, the civil legislation reflected an "anxious solicitude of the law for domestic tranquility." It sought to protect "the family as the place of love," based not on the ruthless self-interest of the political legislation, but on "self-forgetting" and the "capacity to care for another which produces a willingness to care for others."⁵¹⁵ The great strength of Status in the civil legislation was that it maintained the inseparable link between liberty and duty, developing in children and other family members the public virtue that made the family tradition an essential prerequisite not only of the

512. See generally T. REEVE, *THE LAW OF BARON AND FEMME* (3d ed. 1862), quoted in Address by Walter Berns to the Philadelphia Society, *supra* note 508, at 12.

513. Pound, *supra* note 21, at 182.

514. *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888).

515. Address by Walter Berns to the Philadelphia Society, *supra* note 508, at 12-13.

individual tradition, but of a stable democratic society.⁵¹⁶ Thus it could be said by the Supreme Court in 1979: "Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter."⁵¹⁷

When the Court in 1923 first recognized that the right of parents to direct the upbringing of their children was part of the substantive liberty protected by the due process clause,⁵¹⁸ it did not create a new legal right out of whole constitutional cloth. It merely acknowledged in constitutional language the traditions of Status and the civil legislation that predated the Constitution.⁵¹⁹ In that sense, *Meyer v. Nebraska*⁵²⁰ is a clear example of substantive due process as a search only for "fundamental principles as they have been understood by the traditions of our people and our law."⁵²¹

But somehow, in the last twenty years, our concepts have become all confused. Perhaps the confusion began with the passion and the power of the Civil Rights movement, which arose from such bitter ashes that it understandably looked to the potent individualistic constitutional doctrines of the political legislation to resolve problems that were at least as much social as they were political, economic, and governmental. Then the feminist movement, with equal fervor, sought economic and other forms of equality for women in ways that had never been considered by previous women's rights movements in the United States: by pursuing not only economic and political rights per se, but also by going "right to the heart of the matter, which is the historic nature of the *role* of the sexes."⁵²² These movements were joined by an endless variety of other social revolutions so all-encompassing that they had a way of politicizing everything. Each movement sought to discard some objectionable aspect of our traditions. Each viewed with disdain any doctrine which would limit the definition of due process liberty to the very traditions they sought to change.

Amid such turmoil, our settled concepts have become hazy: not abandoned, just hazy. It could be that the traditions of Status and

516. See Part I B *supra*.

517. *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622, 638 (1979) (plurality opinion).

518. See *Meyer v. Nebraska*, 262 U.S. 390 (1923).

519. For a summary of the common law development of parental rights, see Hafen, *supra* note 49, at 613-19.

520. 262 U.S. 390 (1923).

521. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

522. R. NISBET, *supra* note 42, at 83 (emphasis in original).

the civil legislation, based on self-forgetting and a link between duty and liberty, have now been thrown out as so much archaic baggage. If so, marriage, kinship, and the domestic relations should arguably be understood as having joined the individual tradition and Contract, and thus rest upon self-interest, political power, and a concept of liberty that will accept duty only when the power of the State can enforce it.

If all that is true, it is also ironic. The doctrine of economic self-interest, once so much at the center of the individual tradition, has been forthrightly transferred from the protected position of substantive due process to a merely permitted constitutional category.⁵²³ The result is that economic self-interest is now enormously moderated by a potent social interest in the economic welfare of society. Conversely, the family tradition, once so wisely protected from the corrosive influences of self-centered individualism, has been dragged into conceptual alliance with the most politically based individual liberties. One wonders if it has all been done consciously.

The opinions of the Supreme Court discussed earlier suggest that despite all the individual rights rhetoric, most of the Justices still tacitly believe they are maintaining a family tradition based on kinship and marriage, designed to contribute ultimately to a productive, but separate, individual tradition. Whether the historic relationship between the two traditions can continue to be mutually productive is a more open question now than it has ever been before. The enormous influence of the judiciary on the resolution of that question depends, among other things, on its ability to recognize and remain conscious of the very different conceptual and historical purposes of the two traditions, on its ability to use a constitutional test that permits a weighing of the social and the individual interests before shifting the burden of proof, and on its ability to keep watch over the law's general preference for marriage in the face of increasing pressures to ignore it in favor of some specific competing inequity.

In the meantime, we must avoid the naive expectation that the law will magically deliver to individuals an "autonomy that social conditions make it increasingly difficult for them to achieve."⁵²⁴ The search for autonomy, divorced as it now is in the public mind from a search for commitment and duty, is a search that will compound our sense of alienation, not eliminate it. Nietzsche knew the feeling: "Where is — my home?" For it do I ask and seek, and have sought,

523. See notes 400-04 *supra*.

524. C. LASCH, *supra* note 45, at 150.

but have not found it. O eternal everywhere, O eternal nowhere, O eternal — in-vain.”⁵²⁵ De Tocqueville also understood it: “[N]ot only does [the self-interest of] democracy make every man forget his ancestors, but it hides his descendants and separates his contemporaries from him; it throws him back forever upon himself alone, and threatens in the end to confine him entirely within the solitude of his own heart.”⁵²⁶ To divorce liberty from duty is to impair the search for freedom, no matter which extreme we pursue. The totalitarian state has divorced the two, as duty to the collective has become everything. The anarchistic libertarian would divorce the two, as the unrestrained and *self*-fulfilling pursuit of personal liberty becomes everything.

The reality is that liberty and duty are two poles on a single construct. Neither is meaningful without the other. When the link between them is severed, alienation is the only result, whether through the oppression of the State or of existential despair. One of the most productive sources of maintaining the dynamic link between liberty and duty in our own culture has been our understanding of mutual reciprocity between the family tradition and the individual tradition, between Status and Contract. In the long run, the maintenance of that reciprocal link is a critical need for those who seek to “establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty” not only “to ourselves,” but also to “our Posterity.”

525. F. NIETZSCHE, *THUS SPAKE ZARATHUSTRA* 306 (T. Common trans. 1951).

526. A. DE TOCQUEVILLE, *supra* note 396, at 194.