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EVOLUTION AND REVOLUTION IN FAMILY LAW

VICTORIA MIKESELL MATHER*

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I. INTRODUCTION

In this essay, I shall discuss what I consider to be the significant changes in family law during the past twenty-five years, and areas in which I believe continued change is likely to occur. Then I shall describe each element of change in more detail.

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While some may dispute it, I think that family law tends to follow, rather than lead, social upheaval and adjustment in family decisions and structures. For example, the no-fault revolution in divorce law was a response to the rising rate of divorce, not a cause of the phenomenon. In my opinion, the most important legal changes are a direct result of a massive shift in our social, political, and economic constructs in the 1960s, 1970s, and 1980s.

Family law has been transformed in three notable ways since 1968. First, family law has incorporated the concept of serial marriage (or of marriage that is likely to result in divorce) into the rules governing intact marriage relationships as well as divorce, custody, child support, alimony and property division. Second, family law has become more uniform throughout the United States. This uniformity is partially due to the enactment of federal statutes that affect state law, and to the universal adoption of certain uniform acts. Both types of laws frequently deal with parent-child issues such as custody and child support. Third, family law issues have frequently been the focus of United States Supreme Court constitutional law cases. Many ordinary family law problems have been elevated to the status of fundamental questions about personal rights.

While the above trends are likely to continue, I think three other developments will be critical in the evolution of family law. One development is the expansion of the concept of what constitutes a "family" in the modern context. Another development is the treatment of children as autonomous individuals, separate and distinct from their parents in the legal sense of family. The third development is the revolution in reproductive technology. Each of these trends will have a significant impact on the family law of the future.

II. CHANGES IN THE LAST TWENTY-FIVE YEARS

A. *Marriage as a Transient, Rather than Permanent, State*

Approximately half of all marriages entered into during the past twenty-five years will end in divorce.[1] While it is true that the divorce rate has increased dramatically in the recent past, it had been

1. IRA M. ELLMAN ET AL., FAMILY LAW 195-97 (2d ed. 1991).

increasing steadily since the Civil War.[2] The reasons for this phenomenon are unclear, but possible explanations abound. For example, people live longer. Life expectancy has increased significantly, even since the turn of the century.[3] In earlier times, most spouses would not both survive into middle age. Also, at some point, couples in the United States ceased to marry solely for economic security or social status and began to marry for love, companionship, and personal fulfillment. This practice changed the parties' expectations of the marital relationship. In more recent years, social changes such as the women's movement, as well as the technological development of the birth-control pill, have enabled women to become better educated, to participate more fully and at higher levels in the work force, to delay childbearing, and to have smaller families. These opportunities gave women (and, to a lesser extent, men) the financial and emotional ability to leave a marriage when it became unsatisfactory. To be a divorced person, to remarry (most people who divorce eventually remarry), or to be a part of a blended family (formerly step-family) also became more socially acceptable.[4]

1. Prenuptial Agreements

One legal development concerns the parties' agreements before marriage. Twenty-five years ago, courts were reluctant to recognize prenuptial agreements. "Looking to" divorce at the time of marriage, at least in such a direct fashion, was against public policy.[5] Today, however, most states willingly recognize premarital

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2. ANDREW CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 21-27 (1981). The divorce rate, however, seemed to hit a level point or even decrease slightly at the end of the 1980s. IRA M. ELLMAN ET AL., FAMILY LAW 195-97 (2d ed. 1991).

3. *See, e.g.*, Barbara B. Torrey & W. Ward Kingkade, *Population Dynamics of the United States and the Soviet Union*, 247 SCIENCE 1548, 1554 (1990) (discussing life expectancy rates).

4. The following sources address the changing societal stereotypes associated with divorces: MARY A. GLENDON, THE TRANSFORMATION OF FAMILY LAW (1989); MARY A. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1985); ARLENE SKOLNICK, EMBATTLED PARADISE (1991); LENORE WEITZMAN, THE DIVORCE REVOLUTION (1985); Margaret Clelk & T. Allan Pearson, *Perceived Causes of Divorce, An Analysis of Interrelationships*, 47 J. MARRIAGE & FAM. 179 (1985); Arland Thornton, *Changing Attitudes Towards Separation and Divorce: Causes and Consequences*, 90 AM. J. OF SOC. 856 (1985).

5. *See* HOMER CLARK, LAW OF DOMESTIC RELATIONS § 1.9 (1968) (discussing early views on premarital agreements).

agreements if certain safeguards are present.[6] Typically, the agreement must be in writing, the parties must fully disclose their financial situations, and unfair pressure must not be applied to either party.

2. Family Violence[7]

While the law historically has taken a "hands-off" approach to dealing with party disagreements of the intact marriage, one dramatic change has taken place in the area of family violence. Much psychological and sociological research was conducted in the 1960s and the 1970s on the subject of spousal abuse. Thus, the legal system began to recognize the need to deal more effectively with the problem. States instituted educational programs for police officers, judges, prosecutors, and others involved in the legal aspects of battering. Statutes were enacted, giving the victims of family violence greater and more efficient protection from their abusers.[8] State courts began to recognize the existence of the "battered woman syndrome" as a defense or a mitigating circumstance in certain murder or manslaughter cases.[9] Even more interesting is the shift

6. *See* HOMER CLARK, DOMESTIC RELATIONS § 1.1 (2d ed. 1988) (noting abundance of prenuptial agreements); *see also* UNIF. PREMARITAL AGREEMENT ACT § 2, 9B U.L.A. 369 (1987, 1993 Supp.) (listing requirements for premarital agreements); J. Thomas Oldham, *Premarital Contracts Are Now Enforceable, Unless . . .*, 21 HOUS. L. REV. 757, 763 (1984) (addressing enforceability of prenuptial agreements).

7. Many authors have addressed the issue of family violence. *E.g.*, DAVID FINKELHOE ET AL., THE DARK SIDE OF FAMILIES (1983); RICHARD GELLES & MURRAY STRAUS, INTIMATE VIOLENCE (1988); DEL MARTIN, BATTERED WIVES (1976); ERIN PIZZEY, SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR (1977); MARIA ROY, THE ABUSIVE PARTNER: AN ANALYSIS OF DOMESTIC BATTERING (1982); SUSAN SCHECTER, WOMEN AND MALE VIOLENCE (1982); MURRAY STRAUS ET AL., BEHIND CLOSED DOORS, VIOLENCE IN THE AMERICAN FAMILY (1980); LENORE WALKER, THE BATTERED WOMAN SYNDROME (1984); LENORE WALKER, THE BATTERED WOMAN (1979); Katherine Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267 (1985); Victoria M. Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545 (1988).

8. *See, e.g.*, TEX. FAM. CODE ANN., §§ 71.01-.19 (Vernon 1986 & Supp. 1993) (giving Texas statutory provisions for protective orders).

9. A number of books and articles address the modern recognition of the "battered woman syndrome." *E.g.*, ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987); CHARLES P. EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF DEFENSE AS LEGAL JUSTIFICATION (1987); CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE (1989); LENORE WALKER, TERRIFYING LOVE (1st ed., 1989); Victoria M. Mather, *A Scary Tale: Battered Women Who Kill Their Abusers*, 18 OHIO N.U. L. REV. 601 (1992); Victoria M.

in the rape laws of many states that now permit, under certain circumstances, a husband to be prosecuted for the rape of his wife.[10] Both of these developments are partially the result of the recognition that marriage is not a permanent institution, that parties to marriage are separate individuals, and that a wife is not the "property" of her husband.

3. No-fault Divorce[11]

This awareness of the serial nature of modern marriage is reflected in some other changes in divorce law. First, all states have incorporated some form of no-fault grounds into the divorce laws. In some states, no-fault grounds are the only possible grounds. No-fault grounds were intended to reduce acrimony between the parties, because no blame was to be assigned for the breakdown of the marriage. The no-fault model was also thought to be a more realistic legal construct for the dissolution of the marital relationship and less conducive to manufactured or perjured "grounds" for divorce.

The striking thing about no-fault divorce is that it made possible a unilateral decision to dissolve the marriage. Before the advent of no-fault, a party to the marriage had to do something "wrong" (e.g., mental cruelty, physical cruelty, or adultery), and the party filing for divorce had to be without fault before a divorce could be granted. A radical conceptual shift occurred from a blame-based,

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Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545 (1988).

10. *See* Sonya A. Adamo, Note, *The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries*, 4 AM. U. J. INT'L L. & POL'Y 555, 559 (1989) (discussing laws acknowledging marital rape); Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1256 (1986) (addressing emergence of marital rape laws). The states have taken a variety of approaches in this area. Some states have abolished the exemption, and others have limited it to cases in which the parties are separated or divorce proceedings are underway. Some states provide for a qualified exemption; for example, sexual assault prosecution is possible, but a married woman must show bodily harm or threat of bodily harm. *E.g.*, TEX. PENAL CODE ANN. § 22.011(g) (Vernon Supp. 1993). Finally, some states still preserve the exemption. *See generally* Warren v. State, 336 S.E.2d 221, 222 (1985) (finding no exception exempting spousal rape); People v. Liberta, 474 N.E.2d 567, 573 (1984) (disallowing marital-rape exemption).

11. The effects of modern no-fault divorce laws have been revolutionary, as noted by several commentators. *E.g.*, JUDITH AREEN, FAMILY LAW 340-44 (3d ed. 1992); MARY A. GLENDON, THE TRANSFORMATION OF FAMILY LAW 188-96 (1989); LENORE WEITZMANN, THE DIVORCE REVOLUTION (1985); Lawrence M. Freedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 654 (1984).

guilt-and-innocence idea of divorce to a system that granted a divorce simply because one party to the marriage thought it was a good idea. No-fault undoubtedly makes it "easier" to get divorced. Also, no-fault divorce reflects the social and political realities of the serial nature of many modern marriages.

No-fault divorce has been criticized roundly in recent years.[12] The argument is that the no-fault revolution in divorce law has hurt women and children, mainly in the economic sense. Many studies show that women and children are significantly less well-off than men after a divorce, as mothers today are still normally awarded custody of their children.[13] Some authorities contend that no-fault makes it too easy to get a divorce. Also, courts now attempt to avoid placing blame or punishing a spouse who is at "fault." Nevertheless, no-fault divorce clearly seems to be here to stay. The problem of the postdivorce economic situation of women and children needs to be dealt with in other ways.

4. Division of Marital Property at Divorce

Another trend in divorce law acknowledging the indefinite duration of marriage is the recognition of both spouses' contributions to the assets accumulated during the marriage. Not long ago, in a noncommunity property state, each spouse owned property that was labeled with his or her name. At divorce, each spouse was awarded the property titled in his or her name. In modern law, courts tend to use an equitable distribution approach, which may be required by statute as well, to divide property equitably be-

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12. *See, e.g.*, MARTHA FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 21 (1991) (discussing no-fault divorce's negative effects on women). Other sources also discuss problems associated with no-fault divorce. *E.g.*, Richard Inglesby, *Matrimonial Breakdown and the Legal Process: The Limitations of No-Fault Divorce*, 11 LAW & POL'Y 1, 3 (1989); Herma Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1 (1987); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 76 (1993).

13. *See* LENORE WEITZMAN, THE DIVORCE REVOLUTION 337-43 (1985) (discussing statistical studies on the economic effects of divorce). Weitzman in *The Divorce Revolution* found that men in her study experienced a 42% increase in their standard of living while women suffered a 73% decrease. *Id.* Other studies find a smaller decline in living standards for women. *See, e.g.*, Robert S. Weiss, *The Impact of Marital Dissolution on Income and Consumption in Single-Parent Households*, 46 J. MARRIAGE & FAM. 115 (1984) (noting financial problems faced by single parents after divorce).

tween both parties, regardless of the ownership label.[14] The equitable distribution rule is also common in community property states. Community property law vests equal ownership in property acquired during the marriage to both husband and wife. When equitable distribution is applied at divorce, courts *may* award unequal shares of community property to the spouses.

Courts are also experimenting with attempts to divide intangible assets. Studies show that most marriages end within the first nine years of married life.[15] Most couples have not accumulated substantial material assets at that stage of their lives. In fact, the increased earning capacity of one or both partners (through education and experience) is often the major marital asset. As a result, today, unlike twenty-five years ago, courts hold that pensions should be included in the division of marital assets.[16] Also, courts have struggled with the divisibility of professional degrees, professional licenses, and the goodwill of professional businesses.[17]

Today courts do not award alimony often. While alimony was not always awarded in the past, the typical recipient was an upper-middle-class spouse.[18] At present, when alimony is awarded, the award tends to be for a relatively short period of time (one to five years, for example), for the rehabilitation of the ex-spouse.

Although courts are attempting to recognize the serial reality of modern marriage and the contributions of an unpaid spouse, I believe that the law is still deficient in this area. The legal system fails to note that people make decisions in an intact marriage about

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14. *See generally* HOMER CLARK, DOMESTIC RELATIONS § 15.3 (2d ed. 1988) (discussing equitable distribution approach); IRA M. ELLMAN ET AL., FAMILY LAW 224-53 (2d ed. 1991) (addressing modern methods of property division).

15. *See* Alan L. Otten, *People Patterns: Marriages that Fail Do So Early On,* WALL ST. J., June 23, 1989, § 2, at 1 (providing divorce statistics). According to this report, 33% of marriages end within the first four years and 27% within the next five years. *Id.*

16. *See* HOMER CLARK, DOMESTIC RELATIONS § 15.6 (2d ed. 1988) (discussing pensions as marital property). The California Supreme Court found an attorney liable for malpractice when he failed to include a wife's community interest in her husband's pension during her divorce action. Smith v. Lewis, 530 P.2d 589, 594 (Cal. 1975).

17. *See, e.g., In re* Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978) (deciding issue of professional degree as marital property); Dugan v. Dugan, 457 A.2d 1 (N.J. 1983) (discussing divisibility of goodwill); Piscopo v. Piscopo, 557 A.2d 1040, 1042-43 (N.J. Super. Ct. App. Div. 1989) (noting divisibility issues regarding celebrity goodwill); O'Brien v. O'Brien, 489 N.E.2d 712, 714 (N.Y. 1985) (addressing divisibility of professional degree).

18. *See* James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women,* 21 FAM. L.Q. 351, 368 (1987) (discussing typical alimony recipient).

work, children, lifestyle, and education that they would probably not make if they knew that divorce was in their future. The brunt of this failure to look out for possible divorce still tends to fall on the female spouse.

B. *Uniform Laws and Federal Statutes*

The second major existing trend in family law is the consistency of family law rules in the states. The widespread adoption of certain uniform acts and the requirements of federal legislation have made family law statutes more standardized than in the past. Another part of the trend toward uniformity is the extensive body of case law involving family issues as affected by the United States Constitution. This latter trend will be discussed in the next section.

Several uniform acts affecting family law have been promulgated, with varying impacts, in the last twenty-five years. The Uniform Marriage and Divorce Act (UMDA), for example, was approved by the National Conference of Commissioners on Uniform State Laws in 1970, but was adopted by only eight states between 1971 and 1977.[19] However, the provisions of the UMDA have been influential in the development of marriage and divorce laws in other states. The Uniform Marital Property Act was promulgated in 1983, but adopted only in Wisconsin.[20] This Act takes a community property approach to property division at divorce, even in a common-law state. The Uniform Parentage Act was approved in 1973 and adopted by eighteen states.[21] This Act deals with the issue of illegitimate children, and attempts to provide substantive legal equality for nonmarital children. The Uniform Act on Paternity, dealing with procedures to establish paternity and obligations of nonmarital fathers to support their children, was approved in 1960 and adopted in six states.[22] The Uniform Premarital Agreement Act was approved in 1983 and has been adopted in eighteen states.[23]

The two most significant uniform acts in family law concern custody and child support. The Uniform Child Custody Jurisdiction

19. UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 17 (1987).
20. UNIF. MARITAL PROP. ACT, 9A U.L.A. 97 (1987).
21. UNIF. PARENTAGE ACT, 9B U.L.A. 287 (1987).
22. UNIF. ACT ON PATERNITY, 9B U.L.A. 347 (1987).
23. UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 38 (1993 Supp.).

Act and the (Revised) Uniform Reciprocal Enforcement of Support Act have been adopted in some form in all fifty states. The federal legislation affecting family law has also focused on these two areas.

1. Child Custody

As an aside about custody uniformity, virtually all states have the same standard for making the initial custody determination: the best interest of the child.[24] This basic standard has been in place since the mid-twentieth century. No uniform act or federal legislation has affected this basic custody standard. However, how courts apply the standard has changed in the past twenty-five years. In the past, courts would apply the "tender years" doctrine, which would award custody of young children to the female parent, if possible.[25] Courts varied widely in their interpretation of how long children were in their tender years. Courts and legislatures have abandoned the tender years doctrine and now tend to use a list of factors, balancing one parent against the other.

One of the most significant changes in the initial custody determination is the trend toward joint custody.[26] More than thirty states have some sort of joint custody provision in their custody statutes. In several states joint custody is the presumed custody arrangement. For example, joint custody may mean true joint parenting in the physical and legal sense, or it may simply mean joint parental decision making on the big issues (joint legal custody), without joint physical custody. The movement toward joint custody began in the mid-1970s and continues to the present day. The arguments in favor of joint custody are somewhat easy to see: continued contact with both parents for the child and less pressure on each parent individually. Some authors have criticized the joint custody standard for failing to give appropriate weight to the role

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24. *See* HOMER CLARK, DOMESTIC RELATIONS § 19.4 (2d ed. 1988) (addressing standard for custody decisions).

25. HOMER CLARK, LAW OF DOMESTIC RELATIONS § 17.4(a) (1968). Homer Clark's 1968 hornbook seems to indicate that the presumption was alive and well at that time. *Id.*

26. *See generally* HOMER CLARK, DOMESTIC RELATIONS § 19.5 (2d ed. 1988) (discussing custody options); Doris J. Freed & Timothy B. Foster, *Family Law in the 50 States*, 22 FAM. L.Q. 367 (1989) (noting trend toward joint custody).

of the primary caretaker of the children during the marriage.[27] They argue that the fear of a joint custody arrangement leads women to trade property and support for sole custody of their children when negotiating their divorce settlement. Other commentators contend that joint custody may not provide necessary stability for children. They urge the adoption of a primary-caretaker standard, which would be gender-neutral, but which would maintain the child-care patterns that were established during the marriage.[28]

The federal law and the uniform act concerning custody deal largely with postdivorce disputes about custody. Many cases of parental abductions of children have arisen and continue to arise. Until fairly recently, parents could kidnap their own children if they received an unfavorable custody ruling, take the children to another state, and receive a conflicting, but legal, custody determination in the other state. Congress enacted the Parental Kidnapping Prevention Act (PKPA) in 1980,[29] and the Uniform Child Custody Jurisdiction Act (UCCJA) was approved by the National Conference of Commissioners on Uniform State Laws in 1968.[30] These two acts attempt to deal with jurisdictional issues involved in child custody. Each act establishes bases for jurisdiction for a court to render a verdict on custody other than the mere physical presence of the child. Each act also lists four bases for state jurisdiction: (1) the state has been the home state of the child within the last six months; (2) no other state has jurisdiction and the state has a significant connection with the child and at least one of the par-

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27. *E.g.*, JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTEREST OF THE CHILD (2d ed. 1979); LENORE WEITZMAN, THE DIVORCE REVOLUTION 246-53 (1985); Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and its Implications for Women and Children*, 12 GOLDEN GATE U. L. REV. 538, 543 (1982); Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 460 (1984); Janna B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497 (1988).

28. *E.g.*, David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 482 (1984); Martha Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 734 (1988); Marcia O'Kelly, *Blessing the Tie That Binds: Preference for Primary Caretaker as Custodian*, 63 N.D. L. REV. 481, 490 (1987); *see* Garska v. McCoy, 278 S.E.2d 357, 362-63 (W. Va. 1981) (upholding custody provision favoring primary-caretaker parent).

29. Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, §§ 6-10, 94 Stat. 3568-3573 (codified at 28 U.S.C. § 1738A (1988)).

30. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 15 (1993 Supp.).

ties and the issues involved in the custody decision; (3) the child is physically present in the state and has either been abandoned or an emergency situation exists; and (4) if no other state has jurisdiction or another state has deferred, the state may decide the custody issue if it is in the best interest of the child.[31] The PKPA and the UCCJA have some significant differences, although much of the language is the same. The effectiveness of the statutes is subject to question because of some loopholes or ambiguities in the laws.[32] In the future, the states and the federal government may be able to devise ways to avoid some of the difficulties. However, predivorce, prefiling "kidnapping" continues to be a problem.

2. Child Support

The federal government began to involve itself in child support enforcement in 1974, when Congress enacted Title IV-D of the Social Security Act.[33] Title IV-D was an attempt to reduce the drain on the funds for Aid to Families with Dependent Children (AFDC). Title IV-D's provisions required states to set up programs using existing state laws to establish paternity, secure child support awards, and enforce those awards in a timely manner. While this program was helpful, it became clear by the early 1980s that there was cause for alarm about the general level of child support in the United States, in addition to concerns about AFDC. Between 1984 and 1986, only about sixty percent of custodial parents even had a child support order. Of those parents with an order, only about fifty percent received all or virtually all of the support required to be paid.[34]

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31. The Texas version of the UCCJA is found in the Family Code at §§ 11.51-.75.

32. Many authors have questioned the usefulness of PKPA & the UCCJA. *E.g.*, Barbara H. Atwood, *Child Custody Jurisdiction and Territoriality*, 52 OHIO ST. L.J. 369, 371 (1991); Christopher L. Blakesley, *Child Custody—Jurisdiction and Procedure*, 35 EMORY L.J. 291, 300 (1986); Brigette Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 203, 211 (1981); Andrea S. Charlow, *Jurisdictional Gerrymandering and the Parental Kidnapping Prevention Act*, 25 FAM. L.Q. 299, 308 (1991); Russel M. Coombs, *Interstate Child Custody: Jurisdiction, Recognition and Enforcement*, 66 MINN L. REV. 711, 717 (1982).

33. Pub. L. No. 93-647, § 101, 88 Stat. 2351 (1975) (codified at 42 U.S.C. §§ 657-665 (1988)).

34. *See* IRA M. ELLMAN ET AL., FAMILY LAW 402-404 (2d ed. 1991) (noting child support statistics).

Congress thus enacted the Child Support Enforcement Amendments of 1984.[35] These amendments are far more comprehensive than the earlier law and require the states to implement a number of practices and procedures in order to improve the level and the regularity of child support payments. The most significant provisions are: (1) states must formulate discretionary guidelines for courts to use in establishing levels of child support; (2) states must provide for mandatory wage withholding for child support; (3) the statute of limitations for the establishment of paternity cannot be less than eighteen years after the child is born; (4) state and federal income tax refunds can be used to offset delinquent child support payments; (5) liens may be filed against property owned by delinquent obligors; and (6) support arrearages must be reported to consumer credit reporting companies.

Congress followed up in 1988 with the Family Support Act.[36] This law focuses on the modification of support awards and obligates the state agencies responsible for enforcing child support orders to engage in periodic review of those orders and to pursue the adjustment of support orders if they are not in compliance with the state law. Also, the 1988 act reinforces the 1984 amendments by requiring wage withholding to occur immediately at the time the child support order is entered (not just after a delinquency occurs) and by mandating that the statutory child support guidelines be presumptive, rather than discretionary.

The original Uniform Reciprocal Enforcement of Support Act (URESA) was approved by the Commissioners in 1950 and was adopted in several states. Thirteen states still maintain this version.[37] A Revised Uniform Reciprocal Enforcement of Support Act (RURESA) was adopted in 1968, and this version is in effect in the other thirty-seven states.[38] The statute only attempts to improve interstate enforcement efforts and does not directly affect original child support awards. Basically, the law provides three means of securing interstate enforcement of child support orders.

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35. Pub. L. No. 98-378, 98 Stat. 1305 (1984) (codified in part at 42 U.S.C. §§ 666-667 (1988)).

36. Pub. L. No. 100-485, 100 Stat. 2343 (1988) (codified in part at 42 U.S.C. §§ 666-667 (1988)).

37. UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9B U.L.A. 100 (1993 Supp.).

38. (REVISED) UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9B U.L.A. 58 (1993 Supp.).

First, a registration provision is available if an order is already in effect. The obligee can register the order in the state where the obligor resides, and the prosecuting attorney will pursue enforcement in that state.[39] A petitioning process is another means of enforcement, and this method may proceed with or without an existing order. The process begins in the state where the obligee resides and then moves to the state where the obligor resides. Again, the prosecuting attorney follows up in the obligor's state, but the choice-of-law rule applied is the law of the state where the obligor lived when the obligation was incurred.[40] Finally, RURESA provides for extradition when criminal prosecution is sought, although this option is not often used.[41]

Even though universally adopted (in either the original or revised versions), (R)URESA has not been so effective as hoped. Delinquent child support is a widespread problem, and the state offices charged with enforcement are frequently unable to keep up with the demand. Increased staffing and streamlined procedures may improve collection efforts in the future.

C. *The Constitution and Family Law*

The United States Supreme Court has decided several cases in the past twenty-five years that have profoundly altered many of the legal rules affecting the family. A brief overview follows.

1. Marriage as a Fundamental Right

In 1967, the Court held in *Loving v. Virginia*[42] that Virginia's antimiscegenation law was unconstitutional because it violated both due process and equal protection requirements.[43] *Loving* was pivotal in establishing marriage as a fundamental right. In a similar vein, the Court later found that to deny individuals access to the courts for the purpose of obtaining a divorce simply because they could not afford the court fees was a violation of due process.[44] In

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39. *Id.* at §§ 35-40.
40. *Id.* at §§ 7-34.
41. *Id.* at §§ 5-6.
42. 388 U.S. 1 (1967).
43. *Loving*, 388 U.S. at 12. The statute prohibited persons of different races from marrying. *Id.* at 2.
44. *See* Boddie v. Connecticut, 401 U.S. 371, 375 (1971) (discussing denial of due process rights).

1978, the Court struck down a Wisconsin law that made getting married difficult for persons who were delinquent in their court-ordered child support payments.[45] The statute prohibited parents from marrying without court permission if they were subject to a court order to pay child support and did not have custody of the child.[46] The purpose of the statute was to alleviate the welfare burden and to increase payment of child support.[47] In order to get permission, however, the parent had to show that the child support was paid up and that the children were not likely to become public charges.[48] The Court reiterated that marriage was a fundamental right and held that this type of restriction was overly burdensome.[49] Finally, in 1987, the Court held that a Missouri law prohibiting prisoners from marrying without the permission of the superintendent was unconstitutional.[50] The law in issue provided that permission would be granted only under compelling circumstances; in fact, the only compelling circumstances were a pregnancy or a nonmarital birth.[51] The Court found that, although prisoners could be subject to more stringent regulations, the fundamental right to marry could not be restricted in this way.

2. Privacy

The Court began the line of cases protecting a right of privacy in 1965. In *Griswold v. Connecticut*,[52] the Court held that a state law prohibiting the use of contraceptives by married persons violated due process.[53] This decision was crucial in establishing the concept of a right of sexual privacy that would be expanded in later cases. In 1971, the Court struck down a statute that prohibited distribution of contraceptives to unmarried persons.[54] The law in issue violated the Equal Protection Clause of the Constitution, according to the majority opinion of the Court, because no meaningful way to distinguish between married and unmarried persons for the use of

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45. Zablocki v. Redhail, 434 U.S. 374, 377 (1978).
46. *Id.* at 375.
47. *Id.*
48. *Id.*
49. *Zablocki*, 434 U.S. at 375.
50. Turner v. Salley, 482 U.S. 78, 78-79 (1987).
51. *Id.* at 79.
52. 381 U.S. 479 (1965).
53. *Id.* at 485-86.
54. Eisenstadt v. Baird, 405 U.S. 438, 447 (1972).

contraceptives existed.[55] Later, the Court held that a law permitting only pharmacists to sell nonprescription contraceptive devices to persons over the age of sixteen, and prohibiting the sale of such contraceptives to those under sixteen, was unconstitutional.[56] The restriction on adults was simply too burdensome,[57] in the majority view.

An important limit on sexual privacy as a constitutional matter was established by the Court in *Bowers v. Hardwick*,[58] decided in 1986. The *Bowers* majority upheld a state criminal statute prohibiting homosexual sodomy, even for consenting adults performing the activity in private.[59] The majority found that the concept of sexual privacy was limited to conduct grounded in United States history and traditions.[60] Homosexual activity was not included as a fundamental right "implicit in the concept of ordered liberty," or sufficiently established in the national culture.[61] The decision in *Bowers* leaves the legal limits of private consensual sexual activity unclear, particularly in regard to heterosexual couples. For example, may the government ban adult heterosexual couples from engaging in consensual private sodomy?

Another aspect of the right of privacy is explored in the series of abortion cases beginning with *Roe v. Wade*[62] in 1973. In *Roe*, the Court overturned a Texas criminal statute forbidding abortion of a fetus except to save the life of the mother.[63] The Court has decided many cases on the issue of abortion in the aftermath of *Roe*.[64]

55. *See id.* at 438-39 (discussing Court's rationale).

56. Carey v. Population Servs. Int'l, 431 U.S. 678, 680 (1977).

57. *See id.* (criticizing restriction).

58. 478 U.S. 186 (1986).

59. *Bowers*, 478 U.S. at 196.

60. *See id.* at 191-94 (discussing majority's limitations on sexual privacy).

61. *See id.* at 194 (noting Court's opinion on role of homosexuality in American culture).

62. 410 U.S. 113 (1973).

63. *Roe*, 410 U.S. at 166-67.

64. *See, e.g.*, Hodgson v. Minnesota, 492 U.S. 917 (1990) (addressing parental notification issues); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (concerning viability issues); Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (pondering hospitalization requirement for women obtaining abortions); Harris v. McRae, 448 U.S. 297 (1980) (discussing Medicaid funding of abortion issues); Colautti v. Franklin, 439 U.S. 379 (1979) (deciding viability issues); Maher v. Roe, 432 U.S. 464 (1977) (addressing Medicaid funding of abortion); Belotti v. Baird, 428 U.S. 132 (1976) (identifying parental-consent issues); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (describing spousal-consent issues).

Much has been written about the legal, moral, and political issues that the case raises.[65] To date, the Court has not overruled *Roe*, although some limitations have been placed on the right to abortion, over and above those restrictions first outlined by Justice Blackmun in the original opinion. The *Roe* case and the Court decisions discussed below are certainly significant for family law, because they help to define the parameters of some fundamental issues involving conflicts between parent and child, husband and wife, the individual and the family, and the individual and society, as well as help to define the role of welfare benefits in familial decision making.

3. Termination of Parental Rights

The Supreme Court has not done much in the area of termination of parental rights in the past twenty-five years, yet one of the most ideologically significant family law cases in recent history is a termination case. In *Santosky v. Kramer*,[66] the Court held that the constitutionally mandated minimum standard for the termination of parental rights is clear and convincing evidence.[67] Thus, a preponderance of the evidence standard is insufficient to protect the familial rights of the parents. The majority indicated that clear and convincing evidence was the proper standard to be used when both the state and the individual interests at stake were significant.[68] The Court reasoned that a termination proceeding was similar to a civil commitment or a deportation hearing. This decision is philosophically significant because it means that the Constitution requires error in favor of protection of parental rights. The Court's

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65. *E.g.*, ABORTION, MORAL AND LEGAL PERSPECTIVES (Jay L. Garfield & Patricia Hennessey eds. 1984); MARY A. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987); STEPHEN M. KRASON, ABORTION: POLITICS, MORALITY, AND THE CONSTITUTION: A CRITICAL STUDY OF Roe v. Wade AND Doe v. Bolton AND A BASIS FOR CHANGE (1984); THE ETHICS OF ABORTION: PRO-LIFE VS. PRO-CHOICE (Robert M. Baird & Stuart E. Rosenbaum eds. 1989); THE LAW AND POLITICS OF ABORTION (Carl E. Schneider & Maris A. Vinovskis eds. 1980); LAURENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990); PETER S. WENZ, ABORTION RIGHTS AS RELIGIOUS FREEDOM (1992); Albert M. Pearson & Paul M. Kurtz, *The Abortion Controversy: A Study in Law and Politics*, 8 HARV. J.L. & PUB. POL'Y 427 (1985).

66. 455 U.S. 745 (1982).

67. *Santosky*, 455 U.S. at 747.

68. *See id.* at 748 (discussing when clear and convincing evidence standard is appropriate).

decision indicates that we should err on the side of failure to terminate, even if circumstances warrant, rather than err on the side of an improper termination. The implications of this holding are particularly important in evaluating potential legal conflicts between parents and their children.

Two other questions with constitutional implications have arisen in the termination context. One is the question of due process. Some parties have challenged termination statutes by arguing that the standards are vague, or do not require fault or voluntary conduct on the part of a parent. The Court has not addressed this issue.[69] The other question concerns the right to counsel in a termination proceeding. In 1981, the Court considered, but did not definitively resolve, this question.[70] The majority, by a five-to-four margin, left the decision regarding what due process requires under any particular circumstance to the state courts.[71] As a result, the majority of states do require appointed counsel, either by statute or by case law.

4. Paternity

Paternity law, both generally and in the constitutional setting, is in the process of evolution. Not long ago, the (all but irrebuttable) presumption was that a woman's husband was the father of her child.[72] Only if she were unmarried would the issue of paternity come into play. The Supreme Court has visited the issue of the unwed father's rights five times since 1973, leaving a somewhat confusing array of cases in its wake.

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69. *See, e.g.*, Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975) (illustrating that court declines to address issue of voluntary parental conduct). The key issue in these cases is the level of appropriate state intervention. A strong noninterventionist position is taken by some commentators. *E.g.*, JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1979). A more pro-interventionist approach is taken by other writers. *E.g.*, Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 894 (1975); Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1749 (1987).

70. *See* Lassiter v. Department of Social Servs., 452 U.S. 18, 20 (1981) (addressing right-to-counsel issue).

71. *Id.* at 20.

72. *See* HOMER CLARK, LAW OF DOMESTIC RELATIONS 156 (1968) (discussing paternity presumption). This presumption was known as Lord Mansfield's Rule, originating in dictum in *Goodright v. Moss*, 98 Eng. Rep. 1257 (K.B. 1777).

The odyssey began in 1972, with *Stanley v. Illinois*.[73] *Stanley* was actually a termination case, and the Court held that a father could not be presumed to be unfit merely because he was not married to the mother of his children.[74] In this case, the father had a strong, long-term relationship with the children.[75] Six years later, the Court held that a father who had not formed any sort of relationship with his child had no right to veto an adoption of the child by the mother's new husband.[76] However, in the same year, the Court held that unmarried mothers could not be preferred to unmarried fathers in termination or adoption situations. In *Caban v. Mohammed*,[77] a New York statute permitted children to be adopted by a mother's husband without a father's consent, but it prohibited children from being adopted by a father's wife without a mother's consent.[78] In other words, a father's rights could be terminated and his children adopted by someone else, even over his objection, but a mother's rights could not be so terminated. The Court found that the statute violated the Equal Protection Clause.[79] In 1983, in *Lehr v. Robertson*,[80] the Court added to the confusion. *Lehr* established the proposition that an unwed father who neither maintained an active relationship with his child nor took advantage of the statutory opportunities to be recognized as the legal father was not entitled to notice and an opportunity to be heard at the adoption hearing in which the mother's husband petitioned to adopt the child.[81]

Most recently, the Court has, in a way, come full circle on the issue of the rights of the unwed father. *Michael H. v. Gerald D.*[82] presented an interesting fact situation. The mother of the child was an international model.[83] She had an affair with Michael H., who was the probable natural father,[84] but she was married to Gerald

73. 405 U.S. 645 (1972).
74. *Stanley*, 405 U.S. at 647.
75. *Id.* at 649.
76. Quilloin v. Walcott, 434 U.S. 246, 251 (1978).
77. 441 U.S. 380 (1978).
78. *Caban*, 441 U.S. at 384.
79. *See id.* (discussing statute's constitutional violation).
80. 463 U.S. 248 (1983).
81. *Lehr*, 463 U.S. at 249.
82. 491 U.S. 110 (1989).
83. *Michael H.*, 491 U.S. at 113.
84. *Id.* at 114.

D. at all times.[85] The child, Victoria, lived with each of the three adults at various times during her first three years of life, and Michael did establish a relationship with her.[86] A California statute, which has since been changed, created an irrebuttable presumption that the husband of the mother was the father of the child.[87] At some point, the mother and her husband decided that they wanted to exclude Michael from the family relationship.[88] Michael sued, arguing that the statute violated both his and his child's due process and equal protection rights.[89] The case generated five opinions[90] and created significant controversy. Five justices actually did find that the natural father possessed rights that were entitled to constitutional protection.[91] The plurality opinion, written by Justice Scalia, relied on notions of the traditional family and family privacy to reject the natural father's claims.[92] Justice Stevens cast the deciding vote. He agreed with the reasoning of the dissenters, noting that the biological father was entitled to constitutional protection of his rights.[93] Justice Stevens found, however, that the California law in question did give the father adequate opportunity to assert his claims.[94]

All of these cases leave the rights of the nonmarital father in an uncertain state. Unwed fathers can take steps to protect their rights, if they choose to do so. They can establish a relationship with the child and can take advantage of all legal opportunities to

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85. *Id.* at 114-15.

86. *Id.* at 114.

87. *Michael H.*, 491 U.S. at 115.

88. *Id.* at 115-16.

89. *Id.* at 110.

90. *See id.* at 110, 132, 136, 157 (including opinions by Justices Brennan, White, Stevens, O'Connor, and Scalia). Justice Scalia wrote the plurality opinion, joined by Chief Justice Rehnquist. *Id.* at 113-32. Justices O'Connor and Kennedy agreed with Scalia, except for a footnote in Scalia's opinion about historical analysis. *Id.* at 132. Justice Stevens concurred. *Id.* Justice Brennan, joined by Justices Marshall and Blackmun, dissented. *Id.* at 136. Justice White dissented separately, joined by Brennan. *Id.* at 157.

91. *See Michael H.*, 491 U.S. at 128-30 (stating possible constitutional protection of relationship between parent and child).

92. *See id.* at 124 (rejecting traditional protection of relationship between biological father and child).

93. *See id.* at 132 (concurring in judgment with plurality of Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy).

94. *See* Michael Oddenino, *The Good, The Bad and The Ugly: A Critical Analysis of the U.S. Supreme Court Decision in* Michael H. v. Gerald D., 25 FAM. L.Q. 125, 131 (1991) (recognizing adequate redress for biological father).

be recognized as the father. On the other hand, at least some members of the Court would permit a state to cut back significantly the putative father's rights in the interest of traditional marital harmony and family values. The majority of the Court did, however, recognize the significant interests at stake in cases like *Michael H.* I expect the Court will continue to be asked to consider questions involving the rights of the unwed father until some legal clarity begins to emerge.

The Court has considered two other constitutional issues involving paternity. In 1981, the Court found that denying the right to blood tests to a putative father because he was indigent and could not afford the tests was a violation of due process.[95] The right to the blood tests was essential to protect the father's due process rights. In 1987, the Court held that due process was satisfied when paternity was proved by a preponderance of the evidence standard.[96]

5. Gender

The Court has decided a few family law cases involving gender questions. As a matter of constitutional law, gender questions involving equal protection and due process are evaluated under an "intermediate" level of inquiry.[97] A law that treats men and women differently must serve important governmental objectives and be substantially related to the achievement of those objectives. The paternity cases discussed in the previous section raise some gender issues. In those cases, the Court seemed to indicate that there may be some reasons to treat unmarried mothers differently from unmarried fathers with regard to custody and termination of parental rights. These reasons must be carefully considered and justified in a logical way.

In regard to spousal and child support, the Court has failed to find the significant state interest in treating males and females differently. In *Stanton v. Stanton*,[98] the Court struck down a statute

95. *See* Little v. Streater, 452 U.S. 1, 16-17 (1981) (mandating blood tests for indigent parents).

96. *See* Rivera v. Minnich, 483 U.S. 574, 581 (1987) (noting similarities between interest in paternity proceedings and interest in private ligation giving rise to standard of proof).

97. Craig v. Boren, 429 U.S. 190, 203 (1976).

98. 421 U.S. 7 (1975).

that established a lower age of majority for women than for men.[99] The effect of this provision was to stop payment of child support at an earlier age for female children.[100] The Court found that the asserted state justification was inadequate to support the law.[101] The state had argued that women were naturally suited to adult roles as housewives and mothers and would be able to fulfill these roles at an earlier age than their male counterparts.[102] In a similar vein, the Court struck down Alabama statutes that permitted courts to require husbands, but not wives, to pay alimony at divorce.[103] The Court criticized the asserted state justifications that the statute reflected the state's preference that women be kept in a subservient role; that the statute served the goal of protecting needy spouses, and used sex as a proxy for need; and that the statute was an attempt to remedy past economic discrimination against women.[104] In its opinion the Court indicated that, while the second and third reasons might be laudable, this statutory scheme did not advance the goals sought to be achieved.[105] Sex was not a reliable proxy for need, and, because a full hearing was available in any event, such a proxy was unnecessary. The use of alimony as a compensation for past discrimination could actually work to keep women in a subservient role and in a disadvantaged position, according to Justice Brennan's 1979 majority opinion.[106]

Recently, the Court has agreed to hear a gender-based discrimination case that also involves a paternity issue. In *J.E.B. v. T.B.*,[107] the issue is whether a male defendant in a paternity action brought by the state may use the Equal Protection Clause to protest the state's use of peremptory challenges to strike all males from the jury. The claim is based in part on the 1986 case of *Batson v. Ken-*

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99. *See Stanton*, 421 U.S. at 17-18 (noting that statute denies equal protection of laws as guaranteed by Fourteenth Amendment).

100. *See id.* at 9 (citing statute that allows support payments to be terminated when child reaches age of majority, *i.e.*, 18 years for females and 21 years for males).

101. *See id.* at 14-15 (recognizing that children, regardless of gender, must be equally protected).

102. *See Stanton*, 421 U.S. at 15 (rejecting state's assertion that females mature earlier than males and that males need longer educational period to become providers).

103. Orr v. Orr, 440 U.S. 268, 271 (1979).

104. *See id.* at 281 (realizing that statute actually produces adverse results).

105. *See id.* at 282 (demonstrating that statute, in fact, only benefits financially secure wives whose husbands are in need).

106. *See id.* at 283 (noting that gender-based statutes must be carefully tailored).

107. 61 U.S.L.W. 3759 (1993).

tucky,[108] in which the Court held that the state may not use peremptory challenges to strike jurors on the basis of race.[109]

6. Legitimacy

Legitimacy is the final area in which the Court has had significant impact on family law, using the Constitution as a basis for its decisions. In 1968, the Court decided the first of a series of cases that eventually would lead to a complete changeover in the way illegitimate children are treated under the law. In *Levy v. Louisiana*,[110] the Court held that illegitimate children could not be discriminated against with regard to their mothers.[111] The *Levy* case declared that a wrongful death statute could not deny recovery to illegitimate children for the death of their mothers, when legitimate children were permitted to recover.[112] During the 1970s the Court adopted an intermediate standard of review for equal protection claims based on the classification of legitimacy.[113] The cases in this series dealt with discrimination against illegitimate children in such areas as worker's compensation benefits,[114] child support,[115] welfare,[116] and social security benefits.[117] By 1977, the Court also had held that illegitimate children could not be discrimi-

108. 476 U.S. 79 (1986).

109. *See Batson*, 476 U.S. at 84 (requiring race equality in jury selection process).

110. 391 U.S. 68 (1968).

111. *See Levy*, 391 U.S. at 72 (noting that illegitimacy has no relation to parental aptitude); *see also* Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73, 75-76 (1968) (striking state statute barring recovery for damages to parent of illegitimate child).

112. *Levy*, 391 U.S. at 72.

113. *See* Parham v. Hughes, 441 U.S. 347, 351-52 (1979) (noting possible constitutional violation when legislation creates classes based upon immutable human attributes); Lalli v. Lalli, 439 U.S. 259, 265 (1978) (requiring that illegitimacy classification be "substantially related to permissible state interest"). However, it is arguable that the Court did not clarify the standard until the decision in Pickett v. Brown, 462 U.S. 1 (1983). *See* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 14 (1986) (emphasizing judicial incongruency).

114. *See* Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 167 (1972) (upholding statute that allows only legitimate and acknowledged illegitimate children to recover worker's compensation benefits).

115. *See* Gomez v. Perez, 409 U.S. 535, 535 (1973) (overruling discriminatory common law).

116. *See* New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 619 (1973) (striking statutory program because of equal protection violation).

117. *See* Jimenez v. Weinberger, 417 U.S. 628, 631 (1974) (striking provision of social security law denying disability benefits to nonmarital children unless certain conditions are met).

nated against with regard to their fathers. In *Trimble v. Gordon*,[118] the Court established that illegitimate children could not be denied the right to inherit from their fathers when legitimate children would be allowed to inherit.[119]

III. CHANGES IN THE FUTURE

A. *Expand the Definition of Family*

One of the foreseeable trends in family law is the movement to expand the legal definition of family. If asked to define a family, many people will pick a "realistic" definition, such as "a group of people who love and care for each other," rather than a legalistic definition, such as "a group of people, living in the same household, who are related by blood, marriage, or adoption."[120]

Several years ago, the California Supreme Court recognized a potential claim to property and support for an unmarried cohabitant on the basis of both contract and equitable claims in the well-known case, *Marvin v. Marvin*.[121] In *Marvin*, the parties were not married, but had established a marriage-like relationship.[122] Many courts, however, have declined to follow the California court's lead in the *Marvin* case.[123]

At approximately the same time as the *Marvin* case, the United States Supreme Court held that an East Cleveland housing ordinance defined "family" too narrowly and therefore violated the Due Process Clause of the Constitution.[124] The zoning ordinance prohibited a grandmother from living in an apartment with her son and two grandchildren, because the grandchildren were *cousins*, not *siblings*.[125] The Court, however, had previously upheld a zon-

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118. 430 U.S. 762 (1977).

119. *See Trimble*, 430 U.S. at 776 (noting violation of Equal Protection Clause of Fourteenth Amendment).

120. Juan Seligman, *Variations on a Theme*, NEWSWEEK, Winter/Spring 1990, at 38, 38.

121. 557 P.2d 106, 116 (Cal. 1976).

122. *Marvin*, 557 P.2d at 109-10.

123. *See, e.g.*, Hewitt v. Hewitt, 394 N.E.2d 1204, 1211 (Ill. 1979) (noting contravention of public policy as basis for refusing to recognize certain contractual rights of unmarried); *see also* Joel E. Smith, Annotation, *Property Rights Arising from Relationship of Couple Cohabiting Without Marriage*, 3 A.L.R. 4th 13, 43-44 (1979) (discussing case history of unmarried cohabitants).

124. *See* Moore v. City of Cleveland, 431 U.S. 494, 505-06 (1977) (illustrating overreach of ordinance).

125. *See id.* at 496-97 (stressing restrictive scope of ordinance).

ing ordinance that prohibited more than two unmarried persons who were not otherwise related from living together in the same dwelling.[126]

Many municipalities have enacted domestic-partners laws, which permit unmarried cohabitants, usually regardless of sexual preference, to register their relationship, thereby rendering the relationship legal under local law.[127] Some state courts have recognized nontraditional relationships, as did the New York Court of Appeals in *Braschi v. Stahl Associates*.[128] In *Braschi*, the court permitted recognition of the surviving partner of a homosexual couple as a family member for purposes of the New York rent-control ordinance.[129] In a recent, truly ground-breaking case, the Hawaii Supreme Court held that the Hawaii marriage statute may violate the Hawaii Constitution's Equal Protection Clause, because the statute does not permit marriages between persons of the same sex.[130]

I think the law will begin to recognize, perhaps reluctantly, alternative forms of family relationships. What many people think of as the traditional, nuclear, 1950s-style family does not fit the majority of households in the United States today. In fact, that model may be an aberration in the larger historical context of the American family experience.[131] Recent statistics show that approximately 25 percent of all first births in the United States today are to unmarried mothers, and the number approaches 50 percent for African-American women.[132] What we think of as a "traditional" family—husband and wife, living together with children—is a minority family structure today.

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126. Village of Belle Terre v. Boraas, 416 U.S. 1, 10 (1973).

127. *See* Braschi v. Stahl Assocs., 543 N.E.2d 49, 50 (N.Y. 1989) (recognizing domestic-partners law).

128. *See id.* at 55 (discussing the nontraditional same-sex relationship). Denmark's and Sweden's statutory recognition of nonmarital relationships extends to same-sex couples. *See* IRA M. ELLMAN ET AL., FAMILY LAW 871 (2d ed. 1991) (explaining nature of foreign statutes recognizing expanded familial relationships).

129. *Braschi*, 543 N.E.2d at 55.

130. *See* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (indicating possible marital rights for homosexuals).

131. *See generally* ARLENE SKOLNICK, EMBATTLED PARADISE (1991) (tracing changing role of traditional family).

132. *Study Finds Increasing Rate of Out-of-Wedlock Children*, SAN ANTONIO EXPRESS NEWS, Dec. 4, 1991, at B5.

B. *Autonomy of Children—Conflict of Parental and Children's Rights*

The second major development in the future of family law is likely to be the increased assertion of rights of children when a real or potential conflict with parental rights exists. This situation can arise in two contexts: the case of a child in an existing family relationship, and the case of a yet-to-be-born child.

In the existing family, several cases in recent years suggest some of the potential conflicts for the future. For example, a recent case permitted a preteen boy to terminate his mother's parental rights, over her objections, on his own behalf.[133] This action paved the way for his adoption by another family.

Furthermore, there are some advocates for stricter or different divorce laws for families with children. Parents would not be permitted to divorce under these schemes unless the divorce could be shown to be in the best interest of the children, as well as the wish of the parents.[134] Similarly, children could routinely be granted representation in divorce cases where custody is in dispute. Or, children could have the right to enforce visitation from their noncustodial parent. If Dad or Mom did not exercise the right to visitation, the child would have the standing and the legal right to ask the court to order the parent to do so.

There are also many recent cases pitting the rights of biological parents against the rights of adoptive or foster parents. (This general subject was discussed in the section on paternity, above.) However, I think that the law will continue to struggle with the legal importance of the biological tie. The media have devoted much attention in recent months to several cases involving conflicts between foster or adoptive parents and biological parents. Children are placed with foster parents or with couples who hope to adopt, and may be left in that family situation for months or years. The original placement might be owing to abuse or neglect in the home, or might be the result of a mistake. Very young children will

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133. *In re* Gregory K. (Rachael Kingsley v. Gregory Kingsley), Nos. 92-2430, 92-2446, 1993 Fla. App. LEXIS 8645, at *1, *29 (Fla. Dist. Ct. App. 1993).

134. *See, e.g.*, MARY A. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 92-111 (1987) (asserting that child's interest must be considered in divorce cases); Judith T. Younger, *Light Thoughts and Night Thoughts on the American Family*, 76 MINN. L. REV. 891, 903 (1992) (recommending strict divorce requirements).

bond quickly with their caretakers. Later, the biological parents may seek the return of their children. While the traditional legal view tends to uphold the rights of the biological family, particularly parents, the child's psychological and emotional well-being may best be served by a type of balancing or some other test.

Finally, the rights of the yet-to-be-born child have been litigated frequently in recent years.[135] Of course, many cases on the right to an abortion exist, and the Court will continue to work with its decision in *Roe v. Wade*, although it remains to be seen whether *Roe* will be overturned. Even outside the abortion context, the law has often been presented with significant questions involving conflicts between maternal and fetal rights. The problem of cocaine-addicted infants has led some prosecutors to use the criminal law in an attempt to charge mothers with delivery of a controlled substance to their unborn children. While somewhat successful at the trial court level, these efforts often have not been upheld on appeal.[136] The question, however, remains open: How should society balance the maternal rights against those of the fetus, assuming that the mother will not choose the option of abortion? Issues have been raised about prenatal use of alcohol and prescription drugs, and even about proper prenatal eating habits. Some courts have ordered defendants to have the new, surgically implanted Norplant contraceptive inserted, in an effort to stop women who

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135. *See generally* SUSAN FALUDI, BACKLASH 421-37 (1991) (commenting on rights guaranteed to unborn children).

136. *See, e.g.*, *In re* Valerie D., 613 A.2d 748, 753 (Conn. 1992) (overturning termination of parental rights of mother who abused cocaine prior to birth); Johnson v. State, 602 So. 2d 1288, 1296-97 (Fla. 1992) (holding that cocaine which passed through umbilical cord after birth of child was not delivery of controlled substance to minor); People v. Hardy, 469 N.W.2d 50, 51 (Mich. Ct. App. 1991) (holding that legislature did not intend that delivery of cocaine statute apply to transfer of drug from mother to child through post-partum umbilical cord). Efforts to incorporate prenatal abuse into civil child-abuse law have been more successful. *E.g.*, MASS. GEN. LAWS ANN. ch. 119, § 415.503 (9)(a) (West Supp. 1990); *In re* Troy D., 263 Cal. Rptr. 869 (Cal. Ct. App. 1989); *In re* Baby X, 293 N.W.2d 736 (Mich. Ct. App. 1980); *In re* Ruiz, 500 N.E.2d 935 (Ohio P. 1986); Sam S. Balisy, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209 (1987); Dawn Johnson, *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After Webster*, 138 U. PA. L. REV. 179 (1989); Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278 (1990); Tom Rickhoff & Curtis L. Cukjati, *Protecting the Fetus from Maternal Drug and Alcohol Abuse: A Proposal for Texas*, 21 ST. MARY'S L.J. 259 (1989).

are substance abusers from continuing to give birth to children who are drug-addicted, or who are later neglected or abused.[137]

Several cases deal with the issue of forced Caesarean sections, performed over the objection of the mother, or of the husband or other relative of the mother. Sometimes the issue in the case is the mother's religious objection to blood transfusions, or simply her questioning the necessity of the surgery in general.[138] In other cases, the mother may be unconscious because of accident or illness, and the issue is whether to attempt to save the baby even if an operation presents medical risks to the mother.[139]

Particularly in light of constitutionally based privacy precedents in this area, these questions are among the most fundamental and profound issues that we face in family law. These situations directly pit the rights of the not-yet-living against those of the living: the hope and the freedoms of those existing in the present against those to-be-existing in the future.

C. *Reproductive Technology*

If the biological and privacy issues raised above are among the most profound, the reproductive technology issues are certainly among the most interesting in family law.[140] The "abortion pill,"

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137. *See* Stacy D. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 U.C.L.A. L. REV. 1, 15 (1992) (discussing case in which defendant was ordered to use Norplant).

138. *See* Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights?*, 10 HARV. WOMEN'S L.J. 9, 9-10 (1987) (addressing case involving court-ordered Caesarean-section delivery); Susan Goldberg, *Medical Choices During Pregnancy: Whose Decision Is It Anyway?*, 41 RUTGERS L. REV. 591, 595 (1989) (discussing forced Caesarean-section delivery); Dawn Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 599 (1986) (noting court-ordered surgery); Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325, 1325 (1990) (explaining forced Caesarean-section deliveries); *see also* Fosmire v. Nicoleau, 551 N.E.2d 77, 80 (N.Y. 1990) (confronting issue of blood-transfusion objections).

139. *See, e.g.*, *In re* A.C., 573 A.2d 1235, 1237 (D.C. App. 1990) (discussing issue of surgery on terminally ill mother); *see also* Sam Seibert, *A Matter of Life and Death*, NEWSWEEK, Nov. 16, 1992, at 55 (illustrating delicacy of decision). German doctors kept a brain-dead 18-year-old woman who was 14 weeks pregnant on life support for several weeks in the hope of saving the child. *Id.*

140. *See generally* Kathryn Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1641 (1984) (discussing reproductive alternatives); John A. Robertson, *Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 942 (1986) (addressing reproductive technology

R-U 486, makes nonsurgical, private, and early abortion available.[141] Additionally, the ability of the medical establishment to separate the act of sex from the fact of procreation has fascinating possibilities for family law. Artificial insemination has made it possible to enter into surrogacy contracts, in which one woman will carry the child of another individual or couple, either with the surrogate's own fertilized egg, or the other woman's fertilized egg. It is possible for a grandmother to carry her grandchild through a pregnancy, or for an aunt to carry her niece. A lesbian couple may have one partner impregnated with the fertilized egg of the other partner. Fertilized eggs may be preserved for several years, and genetic siblings may be implanted at different times, or in different women. All of these procedures are already possible, although they are not always successfully performed. Additionally, sex-change operations make transsexual marriages possible.[142] The family law implications are already enormous. Who is the mother, the father, or the child in each of these situations? What are the legal relationships between these people, and what are their consequent legal obligations and benefits? The future may bring other, even more mind-bending, possibilities, with genetic transformations, babies made-to-order, or mind- and memory-altering technologies.

IV. CONCLUSION

Family law is one of my favorite subjects for both teaching and research purposes as a law professor. Family law is universal because it affects everyone. It is vibrant in that it changes to reflect and to shape the society of which it is a part. It is unusual because it touches on many other aspects of law in a way that many other subjects do not. And it is challenging, because the way that a soci-

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and its ramifications); Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood*, 1990 WIS. L. REV. 297, 299 (discussing potential effects of emerging technology); Michael J. Yaworsky, Annotation, *Rights and Obligations Resulting from Human Artificial Insemination*, 83 A.L.R. 4th 295, 300 (1991) (explaining issues related to artificial insemination).

141. *See* ETIENNE-EMILE BAULIEU & MORT ROSENBLUM, THE ABORTION PILL 3 (1991) (noting revolutionary method of birth control).

142. *See* M.T. v. J.T., 355 A.2d 204, 205 (N.J. Sup. Ct. App. Div. 1976) (allowing marriage); Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971) (discussing issue of transsexual marriage); *In re* Ladrach, 32 Ohio Misc. 2d 6, 10 (P. Ct. 1987) (prohibiting transsexual marriage).

ety and a legal system treat families says much about both the quality of the society and of the law. Family law is the vehicle that is frequently used to grapple with serious, meaningful, and essential questions about our lives. I hope that we, as lawyers, are able to assist in the struggle in a way that is thoughtful, wise, and humane. A careful look at family law—past, present, and future—is one way to do that.