The Family and the Supreme Court

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The Court and the Status of Marriage; A Progress in Three Phases

The Supreme Court's treatment of marriage is conveniently divided into three phases—Phase One, in which the Court was the self-proclaimed defender of Christian marriage; Phase Two, in which the Court was the creator of partial marriage; and Phase Three, in which the Court became the upholder of no marriage.

Phase One began in the last quarter of the nineteenth century when the Court first concerned itself to a substantial degree with marriage. This was the era of the Mormon polygamy cases. This was the era when Chief Justice Waite sounded precisely like his contemporary, Pope Leo XIII, in declaring marriage to be “from its very nature a sacred obligation”;1 when Justice Matthews echoed the Book of Common Prayer in saying husband and wife are united “in the holy estate of matrimony”;2 when Justice Field upheld an Idaho statute against bigamy because “[b]igamy and polygamy are crimes by the laws of all civilized and Christian countries”;3 and when Justice Bradley sustained the forfeiture of the property of the Church of Jesus Christ of Latter Day Saints because the organization of a community for the practice of polygamy is “contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world.”4 The last time these words of Justice Bradley were quoted

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4. The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890).
with approval by the Court was 1946 by Justice Douglas, confirming the
conviction of certain fundamentalist Mormons as white slavers for marrying
more than one woman at one time.\(^5\)

Phase Two occurred at the time of World War II and its aftermath when
the rapid rise in marital breakups put the greatest strain upon the formal
divorce law of the states. The Court in *Williams I*\(^6\) upheld a Nevada divorce
for visitors to Nevada from North Carolina; permitted in *Williams II*\(^7\) the
state of North Carolina to show that the visitors were, after all, North
Carolina domiciliaries over whom Nevada had no jurisdiction and whom
North Carolina might prosecute for bigamy; let Connecticut in *Rice v.
Rice*\(^8\) treat as a widow in Connecticut the former wife of a Connecticut
resident who had received a divorce valid in Nevada; decided in *May v.
Anderson*\(^9\) that a custody decree valid in Wisconsin would not bind one of
the parents who lived in Ohio; and held in *Vanderbilt v. Vanderbilt*\(^10\) that
a divorce valid in Nevada and New York would not prevent an ex-Vander-
bilt spouse from obtaining a support order as a wife in New York.

The result of these decisions was that you could be free to marry in one
state and be liable in another to personal support of your former spouse,
statutory claims on your estate, and prosecution for bigamy. You could
be entitled to your children in one court system and be denied your children
in another. You could be a somewhere wife or a somewhere husband. You
could be a husband who could not be a widower, a widower who could not
be a husband, a wife who could not be a widow, and a widow who could
not be a wife.\(^11\) *Rice v. Rice* prompted Justice Jackson to invoke *Macbeth*:
“Confusion now hath made his masterpiece.”\(^12\) *Vanderbilt v. Vanderbilt*,
decided after fifteen years of wrestling with these issues, made Justice
Frankfurter exclaim the Court is “turning the constitutional law of marital
relations topsy-turvy.”\(^13\) The Court had created divisible divorce, mobile
marriage, or, most accurately, partial marriage.

Phase Three is modern. It began in 1968 with *Levy v. Louisiana*.\(^14\)
The Court held that a state may not discriminate against those born out of
wedlock in any action for the tortious death of a mother. In almost the

\(^8\) 336 U.S. 674 (1949).
\(^9\) 345 U.S. 528 (1953).
\(^11\) Paraphrasing Justice Jackson in *Rice v. Rice*, 336 U.S. 674, 680 (1949) (dis-
senting opinion).
\(^12\) Id. at 676, quoting *Macbeth*, Act II, scene III, line 65.
\(^13\) Vanderbilt v. Vanderbilt, 354 U.S. 416, 425 (dissenting opinion).
\(^14\) 391 U.S. 68 (1968).
same breath, the Court held in *Glona v. American Guarantee & Liability Insurance Co.* that a state may not discriminate against the mother in an action for the tortious death of a child born out of wedlock.\(^{15}\) None of the justices in the majority or in the minority drew any distinction between discrimination against the child and discrimination against the mother.

*Labine v. Vincent*,\(^ {16}\) decided in 1971, backtracked. The Court held that a state might discriminate against a child born out of wedlock. The state might deny him the right to inherit from the man who had publicly acknowledged him to be his son. Justice Black declared:

> There is no biological difference between a wife and a concubine, nor does the Constitution require that there be such a difference before the State may assert its power to protect the wife and her children against the claims of a concubine and her children. The social difference between a wife and a concubine is analogous to the difference between a legitimate and an illegitimate child. One set of relationships is socially sanctioned, legally recognized, and gives rise to various rights and duties. The other set of relationships is illicit and beyond the recognition of the law.\(^ {17}\)

The state’s power to create and sanction discriminations based on marriage was thus roundly asserted in terms the nineteenth century Court would have understood.

A year after Justice Black’s opinion, the Court decided *Weber v. Aetna Casualty & Surety Co.*\(^ {18}\) Children adulterously born out of wedlock sought compensation under a Workmen’s Compensation Act for the death of their father. Compensation was decreed, and the state statute barring it was invalidated. For the Court Justice Powell wrote, “The status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust . . . . Obviously, no child is responsible for his birth . . . .”\(^ {19}\)

The principle set out was large enough to condemn the discrimination just approved in *Labine*. Conceivably, to avoid fraud, a state could still set a high standard of proof of parentage for children born out of wedlock when their asserted parent was dead. An absolute rejection of their rights was irreconcilable with *Weber*. At the end of 1972, the Court affirmed per curiam *Richardson v. Davis*.\(^ {20}\) The Social Security Administration, by

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17. *Id.* at 538.
19. *Id.* at 175.
incorporating the state’s inheritance laws, had put children born out of wedlock in a second class position for receiving social security benefits on their father’s death. The Court agreed with the District Court that the discrimination was unconstitutional. Per curiam the next month, January 1973, the Court decided Gomez v. Perez.\textsuperscript{21} Texas gave children born in wedlock a right to support from their fathers while it did not give children born out of wedlock. The state, the Court said sweepingly, “may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.”\textsuperscript{22}

The force of the Court’s repudiation of injury to the children brought into question statutory schemes ostensibly directed at the parents. Already in 1968, as a construction of the Social Security Act, the Court in King v. Smith\textsuperscript{23} had invalidated Alabama’s “man-in-the-house” rule. Alabama and nineteen other states treated a man cohabiting with a child’s mother as a parent furnishing support. By this device these states denied the child the status of a dependent child eligible for social security benefits. The rule was found contrary to the federal Act. Congress, said Chief Justice Warren, had “determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children.”\textsuperscript{24}

In the wake of Weber and Gomez, the approach taken in King became, in May of 1973, a matter of constitutional law. The New Jersey Family Assistance Program for the working poor provided that benefits should be paid only to married persons with children who were born in wedlock or with children who were legally adopted. The purpose of this restriction, as found by a three judge federal court, was “to preserve and strengthen traditional family life.”\textsuperscript{25} Testimony showed that “a family structure based on ceremonial marriage could provide norms and prevent anomie,”\textsuperscript{26} said Judge Fisher for this court. The strengthening of family life appeared to be a legitimate legislative end to Judge Fisher. Withholding benefits to encourage marriage appeared a rational way of achieving the end.\textsuperscript{27} In New Jersey Welfare Rights Organization v. Cahill\textsuperscript{28} the Supreme Court summarily reversed. Judge Fisher’s findings of lawful purpose and rational means

\begin{itemize}
\item \textsuperscript{21} 409 U.S. 535 (1973).
\item \textsuperscript{22} Id. at 538.
\item \textsuperscript{23} 392 U.S. 309 (1968).
\item \textsuperscript{24} Id. at 325.
\item \textsuperscript{25} New Jersey Welfare Rights Organ. v. Cahill, 349 F. Supp. 491, 496 (D.N.J. 1972).
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id. at 497.
\item \textsuperscript{28} 93 S. Ct. 1700 (1973).
\end{itemize}
were treated as irrelevant. Per curiam, the Court said it was the child born out of wedlock who was being penalized. Children could not be treated unequally by the state. The Court had now extended protection of the child to the point of rejection of marriage in the definition of a family.

_Levy, Weber, Richardson, and New Jersey Welfare Rights Organization_ all focused on the rights of children. All were dealt with by the Court under the rubric of Equal Protection. In _Eisenstadt v. Baird_, at stake were the sexual rights of the unmarried pubescent and their unmarried elders. Before the Court was a Massachusetts statute on the distribution of contraceptives, restricting them to the married. Equal Protection was again invoked.

The "plain purpose" of the statute, Chief Justice Rugg of Massachusetts had said of its unamended form in 1917, was "to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home and thus to engender in the state and nation a virile and virtuous race of men and women." The purpose of the statute, as Justice Reardon of the Supreme Judicial Court of Massachusetts, had said of its amended form in 1970, was to protect morals through "regulating the private sexual lives of single persons." Sustaining the statute in 1917, Chief Justice Rugg spoke like Cardinal Mercier and the bishops of Belgium, his contemporaries, giving the reasons for the Catholic ban on contraception. Sustaining the statute in 1970, Justice Reardon spoke like some contemporary Catholic apologists giving a reason for the same ban. Speaking in 1972 for the Court, Justice Brennan saw no validity in these purposes. "[W]hatever the rights of the individual to access to contraceptives may be," Justice Brennan said "the rights must be the same for the unmarried and the married alike." The right of the unmarried to be treated like the married in a sexual matter of this character flowed from the equal protection clause. Consistent with that clause, Justice Brennan said, the state could not "outlaw distribution to unmarried but not to married persons."

_Eisenstadt_ also provided occasion for the Court to turn upside down the right of privacy it had discovered in the Constitution in _Griswold v. Connect-

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33. Id. at 454.
In Griswold a Connecticut statute prohibiting the use of contraceptives had been found to invade the privacy of married couples. In Eisenstadt, Justice Brennan said: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear to beget a child." Justice Brennan went out of his way to deny the legal metaphor, founded on the religious metaphor in Genesis, that man and wife are one flesh: "... the marital couple," he said, "is not an independent entity with a mind and heart of its own . . . ." Equal, but separate, each person had a constitutional right to procreative privacy.

In dissent in Eisenstadt, Chief Justice Burger referred to the right to privacy's "tenuous moorings to the text of the Constitution." But it was the doctrine of Justice Brennan which was followed in the Abortion Cases, Roe v. Wade and Doe v. Bolton. The right to an abortion was founded on the right to privacy said to be located in the ninth or fourteenth amendment. No distinction was drawn between the unmarried plaintiff Jane Roe and the married plaintiff Mary Doe.

Unarticulated considerations of policy could explain the Court's actions so far reviewed. The cases involved either illegitimacy or birth control. Illegitimacy has been proportionately higher among non-whites than whites. Lines drawn on the basis of legitimacy could be viewed as a sophisticated form of racial discrimination. The Court could have felt that it realistically extended the constitutional prohibition of racial discrimination in striking them down. Restrictions on methods of birth control prevent expeditious curtailment of population growth. The Court could have felt that the new pressures of population justified the making of new constitutional requirements. That a policy of restricting population conflicts with a policy of not penalizing illegitimacy need not have prevented the Justices from riding first one horse and then the other. These factors of policy may ac-

34. 381 U.S. 479 (1965).
35. 405 U.S. 438, 453 (italics in original).
36. Id.
37. Id. at 472 (dissenting opinion).
41. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1972, TABLE 66: ILLEGITIMATE LIVE BIRTHS BY RACE AND AGE OF MOTHERS 1940-1968 at 51. Interestingly, the illegitimacy rates for non-whites have been decreasing since 1960, while the rate for whites has increased steadily. The non-white rates, however, remain many times greater because of the initial disproportion.
count in part for the Court's approach. They do not explain why the Court has gone as far as it has in its two most striking refusals to acknowledge marriage as a permissible legal criterion.

In Stanley v. Illinois,48 decided in 1972, Peter Stanley had lived intermittently with Joan for eighteen years and had had by her three children whom he did not adopt. When she died, he put the children with foster parents. No one was legally responsible for the children. The state moved to have a guardian appointed. Stanley contended that he was his children's natural guardian and, like a lawful father, could not be supplanted without a hearing in which his unfitness to continue had been demonstrated. The Court sustained his position. Both Due Process and Equal Protection required that he be given a hearing. The state, Justice White wrote, was bound to give recognition through a hearing to "[t]he private interest, that of a man in the children he has sired and raised."44 The state was bound not to discriminate between married fathers and unmarried fathers in giving a right to a hearing. Chief Justice Burger, in dissent, protested that the Constitution was not violated if Illinois recognized the father-child relationship only "in the context of family units bound together by legal obligations arising from marriage or from adoption proceedings." His dissent underlined the significance of the Court's holding. In Glona the unmarried mother had been given the relatively limited rights in tort of a married parent. In Stanley, the unmarried father was accorded the essential position of a married parent in the retention of his children.

The most recent of these decisions treating marriage as a constitutionally impermissible category is the second Foods Stamps Case, United States Department of Agriculture v. Moreno.45 Congress, in 1971, had amended the Food Stamp Act to exclude from its benefits unrelated individuals under the age of sixty living together as a household.46 The Conference Committee Report of the bill said the idea was to prohibit assistance to "communal 'families' of unrelated individuals." Related individuals, the Committee said deliberately, were married spouses, blood relatives and other legally related persons such as adopted children and foster children.47

Judge McGowan, speaking for a three-judge court in the District of Columbia, found the exclusion unconstitutional. The purpose for it advanced by the government had been the promotion of morality—the sexual morality premised on marriage. "Recent Supreme Court decisions," Judge Mc-

43. 405 U.S. 645 (1972).
44. Id. at 651.
Gowan said, "make it clear that even the states, which possess a general police power not granted to Congress, cannot in the name of morality infringe the rights to privacy and freedom of association in the home." 

Judge McGowan was right in his reading of the recent opinions of the Court. Sustaining the decision and adopting much of Judge McGowan's language, Justice Brennan noted with apparent satisfaction that the government had on appeal abandoned the justification of the statute as promotive of sexual morality. The government was left with the barely credible argument that the statute's purpose was to discourage fraud. Justice Brennan exhibited the same impatience as Judge McGowan with a law which made marriage the test of eligibility for a benefit from the state. A heart of stone would have been touched by the carefully-selected plaintiffs: a 56-year old diabetic on welfare sharing a home with another woman and her three children; a mother of three who had charitably taken in a 20-year-old girl with emotional problems; a mother on welfare with a deaf daughter living with another woman in order to be near an institution for the deaf. These persons and those similarly situated could have been aided by construing the statutory exclusion to restrict it to those cohabiting with a sexual purpose. For an unexplained reason Judge McGowan and Justice Brennan thought sexual cohabitation would have been meant only if Congress had spoken of the persons living together as persons of different sexes. Without exploration of the statute's rationale, Justice Brennan held that the classification Congress had created was condemned by the Equal Protection Clause. The classification was condemned, Justice Brennan said, because it was "wholly without any rational basis." 

The third phase of the Court—the phase of the Court obliterating the difference between marriage and no marriage—was well advanced.

**MARRIAGE: A LEGAL CREATION WITH DISCRIMINATORY CONSEQUENCES**

If the Court's teaching of the last two terms is reviewed, the following propositions emerge: Neither Congress nor the States may deny to children born out of wedlock substantial rights which are given to children born in wedlock. Neither Congress nor the States may deny to unmarried per-

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49. United States Dep't of Agriculture v. Moreno, 93 S. Ct. 2821, 2826, n.7 (1973).
50. Id. at 2827.
sons living with their children substantial rights which are given to married persons and their children.\textsuperscript{52} Neither Congress nor the States may deny to unmarried men substantial rights in relation to their children which are given to married men in relation to their children.\textsuperscript{53} Neither Congress nor the States may deny to women, married or unmarried, the right to decide whether to conceive or to bear a child.\textsuperscript{54} Neither Congress nor the States may withhold benefits which are given to the married from the unmarried.\textsuperscript{55} These are the commands of the fifth, ninth, or fourteenth amendments to the Constitution.\textsuperscript{56}

These propositions are taken from the cases. They do not go as far as to state the implications of the holdings, such as the inference that if the decision to procreate is beyond interference of the state, so must be the decision to have sexual intercourse. Marshalled together and baldly stated, the propositions have a generality which goes beyond the cases. The opinions are mired in contexts of facts and particular issues of policy. The general propositions helped to resolve the cases, but they may not stand apart from them. Logic is often drawn up short by countervailing pressure and long-established compromise. Carl McGowan, it might be said, did not mean that the Supreme Court would hold that any statute which based benefits on marriage denied freedom of association in the home. William Brennan, it might be added, did not mean that all sexual rights of the married were indistinguishable from those of the unmarried. Judge McGowan was speaking of food stamps, Justice Brennan of food stamps and contraceptives. Neither really had grand principles in mind. The customary privileges of marriage are anointed by custom so that they are beyond assault in the name of the Constitution.

Constitutional law, however, exists only by virtue of general principles discernible in the Constitution and, once discerned, not easily restricted to special contexts. Having decided cases in such a way that the propositions

\textsuperscript{52} New Jersey Welfare Rights Organ. v. Cahill, supra note 28; cf. King v. Smith, supra note 23.
\textsuperscript{54} Doe v. Bolton, supra note 39; Roe v. Wade, supra note 38.
\textsuperscript{55} U.S. Dep't of Agriculture v. Moreno, supra note 49.
\textsuperscript{56} United States Dep't of Agriculture v. Moreno, supra note 49.
may be framed, how would the Court explain the traditional general discriminations in favor of the married?

Consider as the most obvious example, section 1 of the Internal Revenue Code which taxes every individual "who is not a married individual" differently from "every married individual." The distinction normally works to benefit the married making a joint return. Other sections of the Code openly operate in their favor—section 151 giving a personal exemption for a spouse and an additional exemption for a blind spouse; section 213 permitting deductions for a spouse's medical care; section 2056 subtracting a spouse's share from a decedent's gross estate; section 2523 subtracting a spouse's share from a donor's gift; section 215 permitting a husband to deduct alimony.57 If the married and the unmarried must be treated alike in the distribution of contraceptives, can Congress rationally distinguish between them in the distribution of tax burdens? If to withhold food stamps is to interfere with privacy or the constitutional freedom of association in the home, why is there not as great an unconstitutional abridgment of freedom in the withholding of tax advantages from the unmarried? When the Court in 1916 sustained the distinction between the married and the unmarried in the income tax law, the difference between these classes was apparent on their face—the Court did not bother to discuss the difference; it dismissed the distinction in an "etc., etc."58 In the light of the decisions of the last two years, would two etceteras make the difference evident, or is differential treatment "wholly without any rational basis"?

Suppose it be said that, in structuring the income tax, the power of Congress is practically plenary, and it can make virtually as many distinctions as it chooses, the entanglements of common law and general statutes with the institution of marriage must still be justified. From property law on community property, dower, curtesy, and tenancy by the entirety to the testimonial privilege of excluding a spouse's evidence, legal benefits have been attached to being married. From the right to support from a spouse to the right to alimony from a divorced spouse, special privileges have gone with the married state. Must these benefits and rights be extended to those who, although unmarried, are realistically in a position comparable to spouses, under pain of denying the unmarried the equal protection of the law, the liberty of association, and the right of privacy?

The law not only discriminates in favor of the married. It creates the discriminatory category. Sex, age, race—these are categories which physical characteristics determined before the law responded to them. Being

57. INT. REV. CODE of 1954, §§ 1, 151, 213, 215, 2056, 2523.
married is a status constituted by the law. In the flux of human behavior
the law has marked out certain acts and attached certain consequences to
them. To perform the acts marked out is to become married. To become
married is to enter a state with legal consequences attached. Can the law
create the category and attach the consequences without infringing on sex-
ual privacy, freedom of association in the home, and the equality of indi-
viduals before the law?

To ask these questions may appear to call for an answer too obvious to
argue. As sexual association takes a variety of quasi-permanent forms, so,

it may be said, should the legal definition of marriage be extended and the
benefits which once flowed from a ceremonial exchange of consent be-
tween one man and one woman be those of any pair or any combination of
persons who elect to share a common life. The unique legal privileges of
heterosexual monogamy, it may be concluded, are constitutionally obsolete.

If this obvious answer is correct, it must be given in the name of the Con-
stitution. It would be good to understand the constitutional basis for it.

The Mystic-Moral Character of Marriage

Equal Protection is the rationale chosen by the Court for many of its deci-
sions—Levy, Glona, Weber, Richardson, Gomez, Eisenstadt, Stanley, New
Jersey Welfare Rights Organization and the second Food Stamps Case.
Equal Protection is rightly considered the weakest of constitutional grounds.59
Government acts by making distinctions in roles, in benefits, in burdens.
Unless you suppose you are governed by idiots, you will suppose that there
is usually a governmental reason for the distinction made. Unless you are
hostile to the basis for the distinction, you can usually discover what the
reason is.

The Court in its third phase has been peculiarly blind to the reasons which
led Congress or the States to adopt measures whose effect is to benefit the
married. An extreme example is the second Foods Stamps Case where Ju-
stice Brennan characterized congressional legislation as “wholly without any
rational basis,” and culled from the Congressional Record a remark of
Senator Holland about “hippie communes” to explain the Food Stamp
Act exclusion while overlooking the Conference Committee’s clear expres-
sion of intention to prefer the married.60 In less extreme form, insensitivity

59. Buck v. Bell, 274 U.S. 200, 208 (1927); compare the critique of Eisenstadt
in Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doc-
trine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV.
1, 34-35 and 48 (1972).
60. U.S. Dep’t of Agriculture v. Moreno, 93 S. Ct. 2821, 2826, citing 116 CONG.
to legislative intent pervades Eisenstadt and Stanley.

The law did not suddenly in 1971 begin to treat the married and the unmarried unequally. The law had always done so. If the Court now invokes the Equal Protection Clause, it is because the Court has come to feel that the traditional inequality is intolerable. Why that inequality is now felt to be intolerable is not to be explained by the Equal Protection Clause.

Privacy does not offer a better explanation of the Court's position. When the constitutional right to privacy was first announced in Griswold in 1965—located in Justice Douglas' expressive phrase, in the "penumbra" of several Amendments—it was a right to marital privacy.\textsuperscript{61} The state could not prohibit the use of contraceptives because the state could not invade what were described as "the sacred precincts" of the marital bedroom.\textsuperscript{62} The right of privacy was an offshoot of the holiness of marriage. The opinion of the Court, delivered by William O. Douglas, ended with a tribute to the institution. "Marriage," he wrote, "is coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred."\textsuperscript{63} It was the marital association, older than the Bill of Rights he accurately observed, with which the state could not tamper.

How quickly marital privacy became procreative privacy. How remarkably a right flowing from the institution of marriage became a barrier to the fostering of the institution. With what peculiar intensity William Brennan declared that if the right "means anything," it means the right of "the individual, married or single," to decide whether to bear or beget a child.\textsuperscript{64}

The swift seven year evolution of a liberty so recently proclaimed and so vaguely located suggests that privacy is not at the heart of the Court's constitutional progress. Sexual intercourse and its consequences have been perceived by every earlier generation as social. The imperfect contraceptive technology of the present has not made intercourse less social in its effects upon the persons engaging in it or upon the persons conceived through it. If the Court now sees it as peculiarly private and, therefore, peculiarly exempt from social control, the reason is not to be found in the category the Court imposes on it. Why private? In the answer to this question may lie the basis for the Justices' new position.

The answer may lie in the mythic-moral character of marriage. By mythic I mean ideas, non-demonstrable but not necessarily untrue of the

\begin{itemize}
\item \textsuperscript{61} Griswold v. Connecticut, 381 U.S. 479, 483-84 (1965).
\item \textsuperscript{62} Id. at 485.
\item \textsuperscript{63} Id. at 486.
\item \textsuperscript{64} Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
\end{itemize}
nature of the cosmos in relation to the destiny of man. By moral I mean prescriptions for human conduct in terms of a good. In primitive societies, Mircea Eliade says, the stories of the sexual life of the gods project the societies' view of the cosmos; at the same time they provide paradigms of sexual conduct for human beings. In monotheistic Israel, Yahweh was a jealous husband who demanded the fidelity in monogamous marriage of his chosen bride, Israel. In the Christian community, Christ was the monogamous, faithful husband of his bride, the Church. The paradigm was that of male to female, female to male fidelity, in a fruitful union of perduring character. Marriage in Europe was given a legal structure corresponding to the paradigm.

Until the American Revolution in America, and until still later in England, marriage was created, ruled, and ended in accordance with ecclesiastical law. When secular courts adopted this religious institution, the adjustments were often awkward and inconsistent. The doctrines of recrimination and condonation in divorce law are notorious examples. The institution survived. Eighteenth century rationalism and nineteenth century agnosticism did not attack it. Challenges such as the Mormons' polygamy were local and squashable. The consensus was broad. Division of opinion on divorce appeared to be an exception, but divorce itself was a canonical term; the functional dissolubility of marriage was established in the Catholic Church before the Reformation. In practice, Protestants permitted divorce without welcoming it, and Catholics frowned upon it while cooperating in it as lawyers and judges. The ideal of husband and wife united for life in a fertile union was general. A Connecticut Yankee like Chief Justice Morrison Waite could sound like Pope Leo XIII; a Massachusetts Puritan like Chief Justice Charles Rugg could speak like Cardinal Désiré Mercier and the bishops of Belgium.

68. See NOONAN, POWER TO DISSOLVE: LAWYERS AND MARRIAGES IN THE COURTS OF THE ROMAN CURIA xvii-xviii (1972) [hereinafter cited as POWER TO DISSOLVE].
70. POWER TO DISSOLVE 130-31.
71. E.g., Holyoke v. Holyoke, 78 Me. 404, 411, 6 A. 827, 828 (1886): “Remove the allurements of divorce at pleasure, and husbands and wives will the more zealously strive to even the burdens and vexations of life, and soften by mutual accommodation so as to enjoy their marriage relation.”
72. E.g., Chief Justice Edward D. White, a Catholic, wrote the majority opinion in Haddock v. Haddock, 201 U.S. 562 (1906), premised on “the inherent power which all governments must possess over the marriage relation, its formation and dissolution . . . .” Id. at 569.
In the last half century, the consensus weakened and, in the last decade, disappeared. Under the combined pressures of the ideologies of population control and women's liberation the orientation of marriage to procreation was questioned. The marriage contract in a state such as California became less than any other contract: terminable, without penalty, at the option of either party. A basic rift developed between Catholics, conservative Protestants, Orthodox Jews, on the one hand, and religious liberals and secular agnostics, on the other, over family planning and population control by means of abortion. The notion that a paradigm based on the relationship between Christ and the Church should inform American law would now be incomprehensible to most Americans.

In response to the shattering of the consensus the Court has rejected discrimination between the married and the unmarried. The decisions of the last two terms are another chapter in the history of disestablishment, another milestone, their champions would say, for religious liberty. They are not explicable by the barren formula of Equal Protection. They are not dictated by the new and shapeless right to privacy. They are anchored, according to this analysis, in the most enduring of American constitutional traditions, the separation between religious orthodoxy and civil government. It is no accident that Justice Brennan in Eisenstadt rejects the legal metaphor for the married based on Genesis. The covert religious assumptions underlying the old consensus have made civil support for marriage intolerable. The state, it is concluded, must leave the field; each person is to be free to make his or her own sexual style as he or she is free to make his or her own religion.

Marriage and Family: A Distinction Without Historical Difference

This explanation of the third phase—the last phase, so it seems—encounters one snag: the existence of decisions too recent, too magisterial, and too rooted in experience to be regarded as obsolete, and yet entirely contrary to the line of analysis advanced. The words approvingly quoted by William Douglas in 1946 in Cleveland on the barbarous un-Christian character of polygamy have an atavistic sound. The words of Hugo Black in 1971 in Labine on the social difference between a concubine and a wife have the flavor of the ante-bellum South. The words of Earl Warren in

76. Cleveland v. United States, 329 U.S. 14, 19 (1946); Labine v. Vincent, 401
Loving v. Virginia\textsuperscript{77} and the words of John Harlan in Boddie v. Connecticut\textsuperscript{78}, however, cannot be so irreverently dismissed.

In Loving, in 1967, the Court, after avoiding opportunities for a century, finally ruled that the statute of a state forbidding a black person to marry a white person was unconstitutional. The statute was unconstitutional because the racial classifications violated the Equal Protection Clause.\textsuperscript{79} The statute was also unconstitutional on another ground which Chief Justice Warren put as follows: Marriage is "one of the 'basic civil rights of man,' fundamental to our very existence and survival. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."\textsuperscript{80} The right to enter lawful matrimony could not be arbitrarily restricted because marriage was among the most important of secular liberties.

In Boddie, in 1971, the Court considered the petition of welfare recipients who found the $75 set as court fees for a divorce action in Connecticut more than they could pay. The Court eliminated the fees for persons in their circumstances. Divorce, Justice Harlan wrote, was "the exclusive precondition to the adjustment of a fundamental human relationship."\textsuperscript{81} When the means of obtaining it was denied to the poor, due process of law was denied. The central assumption of the decision was, as John Harlan expressed it, "the basic position of the marriage relationship in this society's hierarchy of values . . . ."\textsuperscript{82}

Loving-Boddie reflect no doubt in the durability of marriage as specifically shaped by law. They take marriage as an institution which is entered through the law, which is a privileged status created by the law. No one reading these opinions could suspect that Richard and Mildred Loving or Gladys Boddie had an alternative they might successfully have pursued—to have asked the Court to abolish the invidious denial of Equal Protection to the unmarried and to invalidate the state's recognition of marriage. In Boddie, marriage according to law is a fundamental human relationship; in Loving, marriage according to law is a vital personal right.

Loving-Boddie gave cognizance to the hunger for lawful marriage of persons denied the possibility of entering it by law. Has that hunger vanished in the six years since Loving or in the two years since Boddie? Are
not the extensive use of poverty lawyers to obtain divorces and the increase of divorce itself paradoxical proof of the American determination to find happy stable centers for personal existence in lawful marriage?\textsuperscript{88} Do not Roger Traynor's words in DeBurgh v. DeBurgh,\textsuperscript{84} a California divorce case decided in 1957, still reflect this society's experience:

The family is the basic unit of our society, the center of the personal affections that enoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people.\textsuperscript{85}

It may be objected that the words apply to the family, not marriage. The two institutions may be distinguished. Justice White in Stanley v. Illinois makes that distinction. Equating married and unmarried fathers, he insists on the Court's continuing solicitude for the family. He declares the Court's respect for "the integrity of the family unit." He sees no inconsistency in enlarging this respect to "those family relationships unlegitimated by a marriage ceremony."\textsuperscript{86} In Stanley the family constituted by law and the family constituted by biology are treated together. The family is viewed as a legal institution distinct from marriage.

Such a view incorporates a profound misreading of the history of our society. We do not know the family except as formed by marriage or as formed in incomplete imitation of the form shaped by law. Without marriage, created by law, acknowledged by law, privileged by law, the family is a formless biological blob. Roger Traynor ends his description of the basic social unit: "Since the family is the core of our society, the law seeks to foster and preserve marriage."\textsuperscript{87} He spoke from American experience. Appealing to an older and wider experience, Pope John XXIII spoke similarly in 1960: Marriage is "the greatest and most precious good of social life."\textsuperscript{88}

What is the value of such testimony to the place of marriage from Pope John or Chief Justice Traynor or Justice Harlan or Chief Justice Warren? I do not invoke their words in this context as religious or judicial authority,

\textsuperscript{83} Cf. T. LITZ, THE PERSON at 389 (1968).

\textsuperscript{84} 39 Cal. 2d 858, 250 P.2d 598 (1952).

\textsuperscript{85} 39 Cal. 2d 858, 863-64, 250 P.2d 598, 601 (1952).


\textsuperscript{87} 39 Cal. 2d 858, 864, 250 P.2d 598, 601 (1957).

\textsuperscript{88} John XXIII, The Holiness of Marriage and the Christian Family, Allocution to the Auditors of the Sacred Roman Rota, October 25, 1960, 52 ACTA APOSTOLICAES SEDIS 901 (1960).
nor do I cite them for their originality of insight or depth of research. Public statements by public men run the risk of derision as platitudes. Yet made by thoughtful persons with broad experience, addressed precisely to the subject before them, stating perceptions they know are shared by their audience, public utterances may be better guides to social experience than the fragile hypotheses of sociological investigators. Such is the case with these statements on marriage of Warren, Harlan, Traynor, and Roncalli. Unselfconsciously they state what they know to be true in their experience, in their observation, in their interpretation of human interactions. They state it knowing that the men and women to whom they speak will acknowledge it as true from their own experience.

The human experience assumed and compressed in these evaluations of marriage cannot be disqualified—thrown, as it were, out of court—by showing that marriage in America was the reflection of an ecclesiastical paradigm, the offshoot of an ecclesiastical system. The survival of Sunday closing hours provides a tame analogy—that the command to worship without working is one of the Ten Commandments, that the seventh day has a basis in Genesis, that Sunday has a relation to the Resurrection have not impaired the laws' secular validity; Justice Douglas to the contrary, the evident religious parentage of the laws has not made them unconstitutional. More fundamentally, the authority of the courts as oracles of justice, the sovereignty of government as a power ordained by God, the sanctity of the human person as created in the image of God—all these vital presuppositions of our system of law—have religious roots, all express mythic-moral perceptions. To suppose that they have constitutional validity, while marriage does not, because they have been and are beyond controversy, would be to show little knowledge of contemporary pessimism and less knowledge of the deepest cleavage in the American past.

Constitutional Judgments In Family Law: An Unsettled Realm

Recent as the most radical decisions are, they are scarcely the work of "the Burger Court," if by that term one means a Court shaped by its Chief Justice. The authorship of the decisions has cut across conventional political and ideological lines—Justice Douglas delivering the opinion in Glona, Justice White in Stanley, Justice Brennan in Eisenstadt and the Food

\[89.\] McGowan v. Maryland, 366 U.S. 420 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961). In dissent in McGowan, Justice Douglas observed that "the parentage of these laws is the Fourth Commandment; and they serve and satisfy the religious predispositions of our Christian communities." Id. at 572-73 (dissenting opinion).

Stamps Case, Justice Blackmun in Roe and Doe. In Eisenstadt, Stanley, and the Food Stamps Case the Chief Justice was in open dissent. In the Abortion Cases his concurrence was directed to moderating the sweep of the Court's opinion. The absence of unanimity in the Court, the failure of the opinion writers to convince the Chief, the contradiction between the generalizations in the recent opinions and Griswold, Labine, Loving, and Boddie all suggest that a definitive rationale for constitutional judgments in the realm of family law has not been settled.

The decisions invalidating discrimination against children may be explained without resort to Equal Protection, the right of privacy, or the relegation of marriage to the status of a suspect mythic-moral category. They rest on a simple principle of generality. The principle is that A may not be punished for the act of B without denying A due process of law. This demand of elementary justice is part of the meaning of the fifth and fourteenth amendments.

Notions of family solidarity and the corporate clan obscured the principle for centuries in relation to children. The Old Testament view that the father's sins are rightly visited on the sons and the New Testament view that sin is inherited made Western minds complacent with the injustice. The more basic notions in Jewish-Hellenic Christianity of personal salvation and personal responsibility worked against this coalescence of children with their parents. King Lear is not a celebration of the nobility of those born out of wedlock, but when Edgar asks: "Why bastard? Wherefore base, When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam's issue?" Who in our culture has not been on his side? The gradual evisceration of the old bastardy discriminations testified to the triumph of the ideal of personal responsibility. The legal principle outlawing all injuries to the innocent child has now been comprehensively stated by Lewis Powell. The principle that the child is not accountable for the parents' act will explain Levy, Weber, Richardson, Gomez, and, on the Court's reading of the facts, New Jersey Welfare Rights Organization. With Edgar we may rejoice: "Now, gods, stand up for bastards." The Court has done so.

92. Exodus 21:5; Romans 5:10-21.
95. King Lear, Act I, scene II, line 22.
96. Since the delivery of the Pope John XXIII lecture, the United States Court of Appeals, 5th Circuit, decided Weinberger v. Bety, 478 F.2d 300 (1973), Certiorari filed, 42 U.S.L.W. 3259 (1973) which extended Social Security disability benefits to illegitimate children without proof that the wage earner actually supported the children.
Glona, Stanley, Eisenstadt, the second Food Stamps Case, Roe, and Doe are not justified by a principle of elementary justice. They are not explicable by the invocation of Equal Protection or the right of privacy. They cannot be explained by viewing marriage as an impermissible religious category, when marriage has social purpose in our society. They are, then, wrong—wrong in using the Equal Protection Clause on behalf of the unmarried parent and the unmarried spouse, wrong in extending the right of procreative privacy to the unmarried person. They are wrong in subverting the privileged status of marriage, contrary to the teaching of Loving v. Virginia and Boddie v. Connecticut, contrary to the place of marriage in American experience. The vital personal right recognized by Loving v. Virginia is not the right to a piece of paper issued by a city clerk. It is not the right to exchange magical words before an agent authorized by the state. It is the right to be immune to the legal disabilities of the unmarried and to acquire the legal benefits accorded to the married. Lawful marriage in the society's hierarchy of values recognized by Boddie v. Connecticut and in the host of laws yet unchallenged—the tax law, the common law of property, the law of evidence—is a constellation of these immunities and privileges. To say that legal immunities and legal benefits may not depend upon marriage is to deny the vital right. To say that Equal Protection requires the equal treatment of the married and the unmarried in all respects is to deny the hierarchy of values of our society.

The nation and the institution of marriage survived Phases One and Two of the Court's exposition of the Constitution and its requirements in the law of domestic relations. Social patterns of sexual behavior are determined by more than court decrees. Marriage as a religious institution, voluntarily entered, is not ended by any court's decree that the married and the unmarried must be treated alike. But the law, while far from omnipotent, has a pedagogic role in the shaping of society which cannot be dismissed. In a secular age, as ecclesiastical authority diminishes, the specific importance of the Supreme Court as the expositor of moral doctrine increases.

The nation and the institution survived Phase One and Phase Two, but the costs of the Court's mistakes were far from negligible. Who can read of the persecution of the Mormons by the federal government without awareness of the cruelty of the Court's conclusions in Phase One? Who can

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The court finds no rational basis for a distinction where such proof is not required of legitimate children.

look at the consequences to husbands, wives, and children of the masterful confusion, the topsy-turvy constitutional law of divorce, support, and custody, without a sense of the Court's incompetence in Phase Two? Who can contemplate the implications of the cases on the rights of the unmarried without a suspicion that the Court has enunciated principles inconsistent with the preservation of the most precious of social goods?

A paper on the family may appropriately end with a children's fable—"The Gingerbread Man." The Gingerbread Man, you may remember, was an exceptionally well-made work of human artifice. After outrunning many dangers he was taken on the tail of an old fox. The fox moved him from his tail to his back, from his back to his nose, and then threw him, topsy-turvy, in the air and on his descent began to eat him.

"I'm a quarter gone," cried the Gingerbread Man. Then, "I'm half gone," he cried. Then, "I'm three-quarters gone." And then there was silence.

If marriage had a tongue like the Gingerbread Man, what would it cry out now?

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