STATUTORY APPENDIX

It is proposed that the following model provision be added to state statutory schemes governing marriage and divorce:

> The court may take appropriate orders of maintenance, support and education of the child or children of the parties, whether of minor or majority age, whether application is made before or after such child or children have attained majority age. In making such awards, the court shall consider all relevant factors which shall appear reasonable and necessary, including:
>
> (a) The financial resources of both parents.
>
> (b) The financial resources of the child.
>
> (c) The standard of living the child would have enjoyed had the marriage not been dissolved.
>
> (d) The child's abilities and ambitions.

NONTRADITIONAL LIFESTYLES AND THE LAW

by Phyllis W. Beck*

I. INTRODUCTION

Current narcissistic wisdom suggests that an individual not get out of bed in the morning until he or she can think of five good things to say about him or herself. Two generations earlier, a friend's grandmother, also addressing the perception of the "self," advised differently. Don't get out of bed in the morning until you can think of three kind things to do for other people. The disparity in advice reflects a widespread, personal revolution: the turnabout from people receiving satisfaction from performing good deeds on behalf of others, to people still valuing good deeds, but convinced that those good deeds begin with themselves.

American society has undergone a fundamental shift in values and an accompanying change of attitudes. The value shift and attitudinal change are reflected in the acceptance of individuals' living together without being married,[1] the increased tolerance of children born out of wedlock, the demand for marriage partners of the same sex, and the fight for freedom of choice in reproductive matters.

The common thread running through these changes—these new cultural imperatives—is the primacy of individuality over the traditional social structure. Different lifestyles are developing and courts are responding to them. It is intriguing to speculate why judges who in the past tried,

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[1] *See* Noonan, *The Family and the Supreme Court*, 23 CATH. U. L. REV. 255 (1973); Clark, *The New Marriage*, 12 WILLAMETTE L. J. 441 (1976); Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663 (1976). *See also*, Marvin v. Marvin, 18 Cal. 3d 660, 684, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1976).

and in part succeeded, to limit their attention to non-personal, economic matters such as taxation, antitrust, and tort liability now tackle problems that are essentially personal. The outcome of their deliberation still has economic ramifications as did their earlier decisions, but the primary impact of their judgments is on our national personal fate and only tangentially on our national pocketbook.

The momentum for the judiciary's current responsiveness to cases involving personal lifestyles may derive from the civil rights movement of the previous decade. In the 1960's, our country was ripe for and responsive to the national outcry against racial discrimination. Ever larger numbers of people were touched by how poorly we treated certain groups of individuals. Why could minorities not get jobs? Why were their children not receiving a good education? Through the medium of thousands of civil rights cases, the courts gained familiarity with matters facing individuals who did not fit the mold of middle America. Following the demand for racial equality came demands for sexual egalitarianism. Interest in individual rights of the majority also grew. Individuals whose lifestyles reflected different values sought redress in the court to legitimize their personal way in life. It was therefore not too great a leap for the courts to shift from defending the rights of minorities to championing personal autonomy and individual lifestyles outside the accepted mainstream of middle class America.

The Sixties generation scrutinized traditionalism, found it flawed, and widened the option of personal choice for themselves. Many parents, including some of the influential elite, were forced to reexamine established mores. Not to do so meant creating a sharp, frequently unacceptable break with their children. In addition to joining the mounting opposition to the Vietnamese war, the older generation—led by the younger—accepted a panoply of lifestyles different from what they had experienced.

II. Marriage

Traditionally, American society beamed and bestowed its national blessing on marriage. It allowed the individual

freedom to choose his or her most intimate domestic companion. It was accepted practice that intimacy would commence only with the legal contract of marriage.

Americans, for the most part, applauded romantic love and personal choice of mate. Unlike most of the rest of the world, marital alliances in America were not arranged for social, political, or economic reasons. American mores, however, did suggest two constraints on such domestic arrangements: marriage had to be between one male and one female; and, it was desirable that the marriage partner come from a background at least as good as one's own.

A very small percentage of people resisted the American tradition favoring marriage. A silent truce existed between society and certain unusual domestic affiliations. Laws were not rigorously enforced against homosexuals who perferred to live quietly together, nor against the poor or Bohemian groups for whom marriage was impossible or ideologically noxious. For many years the country took comfort from the appearance of national domestic harmony. To some, not scrutinizing the facts intently, traditional marriage was mistaken for revealed order. The courts granted marriage and the family a unique and favored position in the law commensurate with their hallowed status in American society.

However, for the past decade, the arrangement of man, wife, and child within a legal framework has no longer been the only acceptable family structure.[2] It has become but one of many possible groupings. Theoretically, any number of men, women, and children may live together. The view has emerged that achieving satisfying intimacy in the home environment is less a result of formal legalistic family structure than of a mysterious, chimerical mixture of personality and character. Traditional social organization has been increasingly attacked in the courts.

A basic shift is reflected in the prevalence and acceptablility of households resembling a legal marital arrangement

[2] Weyrauch, *Informal and Formal Marriage—An Appraisal of Trends in Family Organization*, 28 U. Chi. L. Rev. 88 (1960).

in every way except for the legal imprimatur.[3] The parties agree to live together for an indefinite period, to act as a unit for meeting each other's social, economic, psycholgical, and sexual needs and to hold themselves out to the world as a defined entity. The "marriage" is de facto.

Major legal problems lurk in this situation unless the couple lives in a jurisdiction which recognizes common law marriage. In such jurisdictions, the state probably considers the parties legally married, and the problems unique to de facto unions may not be germane;[4] but, elsewhere hard questions must be anwered. Does the status of a de facto spouse entitle the husband or wife to the same rights as the legal husband or wife? Before the Seventies, the answer was clearly no. The de facto spouse was not entitled to legal rights usually incident to marital status.[5] As the number of unofficial liaisons grow, however, decisional law is developing which acknowledges that parties to de facto marriages may be entitled to property rights.[6]

The best known de facto union was between Lee Marvin and Michelle Marvin.[7] They lived together for about six years. When their household arrangement terminated, she sued him for a share of the property acquired during their

[3] The discussion does not include households in which unrelated individuals live together for rewards other than conventional familial ones. *See* United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) and Villiage of Belle Terre v. Boraas, 416 U. S. 1 (1974). For the complex problems of individuals in a household consisting of the single mother and her illegitimate child or children, *see* Mathews v. Lucas, 427 U.S. 495 (1976); Gomez v. Perez, 409 U.S. 535 (1973); Labine v. Vincent, 401 U.S. 532 (1971); Levy v. Louisiana, 391 U.S. 68 (1968); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

[4] Thirteen states and the District of Columbia recognize common law marriage. H. CLARK, LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 46 (1968).

[5] The traditional rule which prevails today, with certain exceptions, allows neither cohabitant rights in the property of the other. Stevens v. Anderson, 75 Ariz. 331, 256 P.2d 712 (1953); Cargill v. Hancock, 92 Idaho 460, 465, 444 P.2d 421, 426 (1968).

[6] *See* Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). *See also* Kay & Amyx, *Preserving the Options*, 65 CAL. L. REV. 937 (1977); Comment, *Property Regrets upon Termination of Unmarried Cohabitation: Marvin v. Marvin*, 90 HARV. L. REV. 1708 (1977); 16 J. FAM. L. 331 (1977-78).

[7] Michelle Marvin changed her surname to match her cohabitant's. Her name had been Triola. Brief for Respondent at 9.

period together[8] alleging that the couple had entered into an express contract to share the property and income accumulated by them during the cohabitation. Mr. Marvin defended against Michelle's claim. He denied the contract and argued that because he and Michelle never married, she had no claim against his property.[9] As a matter of fact, Marvin had been married to another woman at the time he and Michelle set up housekeeping. Marvin's second and alternative line of attack relied not on Michelle's lack of status as his wife, but on the alleged contract. Mr. Marvin denied making an agreement; and, even if the court was persuaded that the parties had entered into a contract, he maintained it was unenforceable as against public policy. Marvin relied on the traditional view that the couple's relationship was immoral. He expected the court would not enforce an agreement based on unlawful (immoral) consideration.

The California Supreme Court made history when it declared that the parties may have entered into an enforceable contract.[10] The court ruled that unmarried cohabitants could recover assets accumulated during their union if the claimant could prove a contractual or equitable foundation

[8] During the period of cohabitation all property was placed in Lee Marvin's name. The property included over one million dollars in motion picture rights. Marvin v. Marvin, 18 Cal. 3d 660, 666, 557 P.2d 106, 110, 134 Cal. Rptr. 815, 819 (1976). *See* Folberg & Buren, *Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families*, 12 WILLAMETTE L. J. 453 (1976).

[9] The Marvin court rejected the extension of the system of property distributed under California community property law to de facto relationships. Marvin v. Marvin, 18 Cal. 3d 660, 675-81, 557 P.2d 106, 122-23, 134 Cal. Rtpr. 815, 825-29 (1976).

[10] A de facto partner is entitled to enforce contracts and assert equitable interests in property in the same way as an individual who entered into a contract or could assert entitlement on another theory. Marvin v. Marvin, 18 Cal. 3d 660, 684 n.24, 557 P.2d 106, 122 n.24, 134 Cal. Rptr. 815, 831 n.24 (1976). Traditionally, contracts between married partners dealing with property division upon dissolution of the marriage are unenforceable except as to distribution upon the death of the partners. The California court questioned this view and approved the proposition that a couple may agree to divide earnings and property in the event of dissolution. *Id.* at 674 n.10, 557 P.2d at 116 n.10, 134 Cal. Rptr. at 825 n.10 (1976). The decision that courts enforce contracts between cohabitants is a recent phenomenon. In Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976), the Oregon Supreme Court upheld the validity of express contracts between cohabitants. *See* Tyranski v. Piggins, 44 Mich. App. 570, 573-74, 205 N.W.2d 595, 598 (1973).

for his or her demand. The court, with justification, expressed concern that the consequences of its conclusion might undermine the legal foundations of marriage.[11] It therefore stressed a supportive position in favor of legal alliances and noted it was not changing California's established law relating to marriage and divorce. The court claimed its decision would not discourage marriage. On the contrary, the court hoped the ruling would encourage marriage. The California court reasoned that if it refused to grant relief to Michelle, the income producing partner would be encouraged to avoid marriage and retain the benefit of his or her accumulated earnings.[12] In other words, if the law forced the income producing partner to share his property with his or her mate, regardless of marital status, the financial incentive to remain single would be attenuated.[13]

Therefore, the California Supreme Court, in line with the 1970's shift in values, awards legal recognition to de facto unions even if only on a limited property basis. Whether such recognition devalues formal marriage is difficult to determine. An unarticulated—and even unwanted—consequence of its decision may be symbolic. The message the court may be telegraphing is that non-traditional alliances are now socially and legally supportable. The decision may not, as the court would like to think, encourage marriage. Cohabitants—especially Californians—now know that the terms of their living arrangement are negotiable and legally enforceable, and they may therefore contract with their partners to deny them the profits accumulated during the union. In weighing individual values against broader social goals, the court has decided in favor of the individual.

[11] The Marvin decision does not equate de facto with de jure marriage. Marvin v. Marvin, 18 Cal. 3d 660, 684 n.24, 557 P.2d 106, 122 n.24, 134 Cal. Rptr. 815, 831 n.24 (1976).

[12] *Id.* at 683, 557 P.2d 122, 134 Cal. Rptr. 831 (1976), quoting *In re* Marriage of Cary, 34 Cal. App. 3d 345, 353, 109 Cal. Rptr. 862, 866 (1973).

[13] In accordance with the understanding of the two parties, the court could find an implied-in-fact agreement even in absence of an express agreement. The court suggests that in addition to an implied-in-fact agreement, where the facts warrant, the courts may conclude the existence of a partnership, joint venture, resulting trust, or constructive trust. Courts may also base recovery on the theory of quantum meruit. Marvin v. Marvin, 18 Cal. 3d 660, 684, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1976). Justice Clark, concurring and dissenting, did not support the court's broad statement relating to remedies available in de facto relationships. *Id.* *See also* Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L. Q. 101 (1976).

The California decision also reflects a 1970's attitude toward sexual relationships outside of legal marriage, *i.e.*, an acknowledgment that sex is part of a total relationship and the presence of that aspect in a relationship does not make it meretricious or illegal. Ordinarily a contract based on a meretricious or illegal consideration is unenforceable.[14] For example, a contract for payment to a prostitute is unenforceable because prostitution is illegal, and courts will not enforce a contract based on it. The Marvins' living arrangement included a sexual element. The lower court, echoing years and years of precedent, denied Michelle's contract argument because the consideration was predicated on a sexual relationship.[15] The Supreme Court of California rejected that proposition. It noted that a contract that included sex—but whose foundation was not sex—was not meretricious and therefore enforceable.[16]

While living together may have started with the young, it has now spread to the middle and older aged community.[17]

[14] The doctrine of illegality may cause an agreement to be unenforceable as against public policy if the parties are unmarried and sexual intercourse is part of the consideration. A. CORBIN, CONTRACTS § 1476 (1962); RESTATEMENT OF CONTRACTS § 589 (1932).

[15] Marvin v. Marvin, 2d Civil No. 44359 (Cal. Ct. App. July 23, 1975), *withdrawn*, 50 Cal. App. 3d 84 (1975).

[16] The California Supreme Court noted that express contracts between unmarried individuals living together are enforceable except where the contract is explicitly for sexual services. Marvin v. Marvin, 18 Cal. 3d 660, 672, 557 P.2d 106, 114, 134 Cal. Rptr. 815, 823 (1976). It is rare for the doctrine of illegality to be relied upon to deny relief. Note, *Property Rights Between Unmarried Cohabitants*, 50 IND. L.J. 389 (1975).

[17] Living together rather than legal marriage may also be encouraged by the more favored tax consequences for certain categories of singles whose income is approximately the same as a result of Title VIII of the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487; McIntyre & Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573 (1977); Richards, *Discrimination Against Married Couples Under Present Income Tax Laws*, 49 TAXES 526 (1971).

The phenomenon reflects several factors: economic necessity,[18] primacy of the individual over traditional social organization, and the weakening of society's disapproval of domestic arrangements other than legal marriage.

De facto unions among the middle and older aged groups may be numerous enough to constitute a trend which raises significant legal issues. For instance, a common provision in a divorce decree may provide payment of alimony until the recipient spouse remarries. A parallel provision in a will may provide periodic payment to the surviving spouse until he or she remarries. These situations demand a redefinition of marriage. Has a relationship developed that may be defined as marriage if the recipient or surviving spouse cohabits with a friend in a domestic arrangement they consider permanent, even though it has not been formalized?[19] Hypothetically, if Michelle Marvin had been receiving alimony would the court have required her former husband to continue payment during the period she was living with Lee Marvin? An aggrieved divorced husband may come into court protesting alimony when his former wife has set up housekeeping with a male friend. He would rightly argue that he is being penalized because the couple's union is de facto. Furthermore, continuation of payment is contrary to his, and perhaps his former wife's, expectations when the divorce decree was entered.[20] A similar scenario is played out

[18] Foster, *Marriage and Divorce in the Twilight Zone*, 17 ARIZ. L. REV. 462 (1975).

[19] Cases based on statutory interpretation do not show a consistent trend. Powell v. Rogers, 496 F.2d 1248 (9th Cir. 1974), *cert. denied*, 419 U.S. 1032 (1974) (unmarried cohabitant was not entitled to death benefits under the Longshoremen's and Harbor Workers Compensation Act); Fleming v. Fleming, 221 Kan. 290, 559 P.2d 329 (1977) (alimony obligation continues); West v. Barton-Malow Co., 394 Mich. 334, 230 N.W.2d 545 (1975) (unmarried cohabitant was entitled to death benefits under the state's Workmen's Compensation Act); Taake v. Taake, 75 Wis. 2d 115, 233 N.W.2d 449 (1975) (alimony obligation terminated but may be continued if the de facto relationship terminates). A method of avoiding definitional problems is in C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 747-48 (2d ed. 1976). The authors ask whether a de facto relationship which continues for more than one year should raise a presumption that the parties expect the relationship to have economic consequences.

[20] L. CASLER, IS MARRIAGE NECESSARY? (1974); A. SKOLNICK & J. SKOLNICK, FAMILY IN TRANSITION: RETHINKING MARRIAGE, SEXUALITY, CHILD REARING & FAMILY ORGANIZATION (1971); Glick, *A Demographer Looks at American Families*, 37 J. MARR. & FAM. 15, 16 (1975); M. Novak, *The Family Out of Favor*, HARPER'S MAGAZINE, April 1976, at 371.

vis-a-vis the surviving widow. The protestors this time are the potential legatees whose rights ripen upon the widow's remarriage.

Courts have had difficulty defining marriage or establishing criteria in a de facto union that give rise to property interests associated with legal marriage.[21] The Marvin court avoided the issue completely and laid the foundation for recovery on a contract or equity basis and not on the basis of entitlement derived from legal status. Most courts view marriage as a status achieved only after the couple has satisfied the requisite statutory procedures. In the majority of jurisdictions, the divorced spouse who lives with another partner continues to receive alimony and the widow or widower living with a new mate continues to receive periodic payments.

III. ILLEGITIMACY

A companion and not unexpected problem is the rights of children born into de facto unions. Informal marriage,[22] like other sexual liaisons, sometimes breeds children. Such a child has been referred to as illegitimate, "filius nillius" (nobody's child), and a child out of wedlock.[23]

Providing financial support for children is one of society's central concerns. Natural parents, married or unmarried, are with rare exception responsible for their children's support. Courts and legislatures reinforce this sensible standard.[24] Until recently, state legislatures and courts have de-

[21] *See* Lee, *The Changing American Law Relating to Illegitimate Children*, 11 WAKE FOREST L. REV. 415, 435-36 (1975).

[22] Under early American common law the mother but not the father was obligated to support. The position of the father has been changed by statute. Currently, statutes have been enacted in nearly every state compelling fathers of illegitimate children to support their children.

[23] *See, e.g.*, Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974). *See also* Wasiolek v. Wasiolek, 251 Pa. Super. Ct. 108, 380 A.2d 400 (1977).

[24] Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113

cided the fate of illegitimates and thereby influenced the community's attitude toward them. Beginning in the sixties, however, the United States Supreme Court reviewed a series of challenges to state laws which discriminated against illegitimates. The consequences of the Court's action is that fewer sins of the parents are now visited upon their children. The Court has somewhat, but by no means completely, blurred the distinction between legitimates and illegitimates.[25]

In this line of cases the United States Supreme Court found unconstitutional several state statutes which discriminate against illegitimates. For example, the rights of illegitimates became coextensive with those of legitimates in recovering damages in wrongful death actions,[26] in collecting insurance proceeds as a beneficiary under a state's workman's compensation system,[27] and in asserting the right to support from the natural father.[28] In most of the state statute cases, the United States Supreme Court asked two questions of illegitimates in instances where they found unequal treatment. Can illegitimates prove their lineal ties? And, if they can, are they entitled to equal treatment with their blood or half-blood siblings?

Progeny of an informal union are still afforded fewer rights than their legitimate counterparts. Unequal treatment of illegitimates triumphed recently when the Supreme Court upheld a New York statute which denied an illegitimate his right of inheritance on the same basis as a legitimate where

(1973). One change, however, is worthy of note; it is a change in emphasis rather than direction, and although not inspired by the new lifestyle, it has tangentially affected it. In states which have made constitutional provision for an Equal Rights Amendment, courts have equalized the duty of support between the natural mother and father. In contrast, in the pre-ERA period the natural father was primarily responsible for support of children with the natural mother assuming the secondary position. Now both parties are equally obligated. Note, *Illegitimacy and Equal Protection*, 49 N.Y.U.L. REV. 479 (1974); Clark, *The New Marriage*, 12 WILLAMETTE L. J. 441, 446-47 (1976); Lee, *The Changing American Law Relating to Illegitimate Children*, 11 WAKE FOREST L. REV. 415 (1975).

[25] Levy v. Louisiana, 391 U.S. 68 (1968).

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

[27] Gomez v. Perez, 409 U.S. 535 (1973).

[28] Lalli v. Lalli, 99 S. Ct. 518 (1978).

the estate of his father was being distributed under the intestacy laws.[29]

In addition to state legislation, a whole range of federal statutory benefits are problematic for illegitimates.[30] The United States Supreme Court still denies illegitimates certain benefits granted to legitimates. For example, an illegitimate is not entitled to admission preference under the Immigration and Nationality Acts of 1952;[31] and, the Social Security Act is a mine field for illegitimates. The pattern under the Social Security Act requires a child to be dependent before he is entitled to certain death benefits through his father. As to legitimate children, the Act presumes dependency, but as to illegitimates it does not. The Supreme Court in a recent death benefits case upheld this distinction as consistent with the equal protection guarantee.[32] The Court

[29] *Id.* *Lalli* did not directly overrule Trimble v. Gordon, 430 U.S. 762 (1977). *Trimble* struck down the Illinois Probate Act which permitted illegitimate children to inherit only from their mothers while allowing legitimate children to inherit from both parents. Mr. Justice Blackmun, in a concurring opinion in *Lalli* states, "I would overrule *Trimble*, but the Court refrains from doing so on the theory that the result in *Trimble* is justified because of the peculiarities of the Illinois Probate Act. . . ." Lalli v. Lalli, 99 S. Ct. 518, 529 (1978).

[30] In addition to the Social Security Act, other federal statutes provide payments of benefits for federal employees and their dependents. Civil Service Retirement Act, 5 U.S.C. §§ 8301-8348 (1976); Federal Employees Health Insurance Act, 5 U.S.C. §§ 8901-8913 (1976); Federal Survivor Benefit Plan, 10 U.S.C. §§ 1447-1455 (1976); Foreign Service Act, 22 U.S.C. §§ 1061-1121 (1976). The illegitimate's receipt of benefits is often conditioned on his or her qualifying as a "child" as defined in each statute. Civil Service Retirement Act, 5 U.S.C. § 8341 (3) (1976); Federal Employees Health Insurance Act, 5 U.S.C. § 8901 (5) (1976); Federal Survivor Benefit Plan, 10 U.S.C. § 1447 (5) (1976); Foreign Service Act, 22 U.S.C. § 1064 (3) (1976). Some statutes also impose a dependency requirement. Federal Survivor Benefit Plan, 10 U.S.C. § 1447 (5) (1976); Foreign Service Act, 22 U.S.C. § 1064 (3) (1976); 37 U.S.C. § 401 (2) (1976). Benefits may also be conditioned upon the child's being recognized as the natural child and living in a child-parent relationship with the person covered by the particular statute. Civil Service Retirement Act, 5 U.S.C. § 8341 (a) (3) (A) (ii) (1976); Federal Employees Health Insurance Act, 5 U.S.C. § 1447 (5) (C) (ii) (1976). *See also* Alito, *Equal Protection and Classifications Based on Family Membership*, 80 DICK. L. REV. 410 (1976); Comment, *The Expanding Rights of the Illegitimate*, 3 CREIGHTON L. REV. 135 (1970).

[31] Fiallo v. Bell, 430 U.S. 787 (1977).

[32] Mathews v. Lucas, 427 U.S. 495 (1976). *See* Note, *Mathews v. Lucas: A Setback in the Illegitimate's Quest for Equality Under the Law*, 16 J. FAM. L. 37 (1977-78). Mathews v. Lucas involved illegitimate children whose father died dur-

found the distinction was a reasonable empirical judgment in line with the Act's design. It is apparently natural to presume dependency for the legitimate while it is not for the illegitimate.[33]

Perhaps underlying state statutes and court decisions which deny full legal rights to illegitimates is the knowledge that every state provides some mechanism short of marriage for an out of wedlock child to be legitimized by legal action of the father. The legitimized child is legally the peer of legitimate children. While lawyers may be cognizant of these legal procedures, the poorer segment of society which produces a disproportionate number of the illegitimate population is not. Furthermore, even adult males who may be informed about legitimization procedures may be disinclined to cooperate. Legitimization of a child imposes upon them the obligation to support. While paternity is in doubt, the court cannot require the putative father to support.

Children out of wedlock may be the innocents who are damaged by the new life styles. The foundation of their lives—the intact family—may have softened as lifestyles tolerating greater individual autonomy have increased.

IV. Homosexuality

Another segment of society trumpets an individualistic solution to a unique problem. The homosexual community is seeking to make the American social structure more elastic. It is pressing for de jure recognition of marriage in which the two partners are of the same sex.

It is ironic that some males and females who possess legal capacity to marry one another resist de jure marriage in favor of living together, while some individuals of the same sex, whose legal capacity to marry one another is questionable, prefer de jure marriage to living together. The

ing an absence of several years from the home. The children were unable to prove dependency at the time of father's death despite fact that the man had lived with the family for 18 years prior to his departure.

[33] *See* Krause, *Bringing the Bastards into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 Tex. L. Rev. 829 (1966).

homosexual community's move toward legally sanctioned marriage between persons of the same sex has two goals: the psychological comfort and security of legally sanctioned domestic companionship, and the abolition of what it views as discriminatory laws.[34]

According to newspaper accounts,[35] many thousands of homosexual couples have married. Communities such as Boulder, Colorado, were at one time issuing licenses, and ministers in local churches were solemnizing homosexual marriages. In other communities where clerks would not issue marriage licenses to two persons of the same sex, homosexual marriage was accomplished by one of the partners "passing" for an individual of the opposite sex.

The marriage licensing acts of most states do not expressly prohibit marriage between persons of the same sex.[36] The accepted assumption of the statute has traditionally been a male-female coupling. The legal challenges on behalf of homosexual marriages have attacked licensing statutes; but, so far the attacks have failed. Where the issue has been adjudicated, the courts have interpreted the statutes to require application from an eligible female and male as a condition of licensure.[37]

The legal status of homosexual couples who marry after obtaining a license is unclear. The status will be clarified in the future when the surviving spouse of a homosexual couple files for social security benefits, for example, and the claim is challenged on the basis of an invalid marriage. Or, the status may be clarified when a homosexual immigrant spouse petitions to remain in the United States on the grounds that he or she is legally married to a homosexual.

To balance the picture, it must be emphasized that sexually unorthodox lifestyles represent the preference of the

[34] *See* Note, *The Legality of Homosexual Marriage*, 82 Yale L.J. 573 (1973).

[35] N.Y. Times, April 27, 1975, at 49, col. 3.

[36] *E.g.*, Uniform Marriage and Divorce Act (as amended 1971).

[37] Jones v. Hallahan, 501 S.W.2d 588 (Ky. App. 1973); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

minority, not the majority.[38] The minority, however, is articulate and organized. They press their social and legal position in an adversarial arena and force the courts and legislatures to rethink traditional views.

V. Contraception and Abortion

Reproductive freedom has, perhaps, been the most potent force to date in lifestyle changes and attitudinal shifts. The development and popularization of "the pill" opened the gates to reproductive freedom and to legitimizing different lifestyles. Previously, the possibility of pregnancy narrowed the choice for many couples to de jure marriage. Sexual encounters, whether casual or part of de facto marriage, led to the risk of pregnancy. The non-married, pregnant woman was faced with consequences that were at best unpalatable. She could procure an illegal abortion, parent an illegitimate child, or marry.

In most states birth control measures were legally available; in others they were not. In those states in which birth control was available, it was acceptable for the man to buy protection at the corner drugstore or a vending machine in the men's room. It was not so easy for the unmarried woman. She had to overcome both personal and social inhibitions before going to a doctor to have a contraceptive device, usually a diaphragm, prescribed. Because of these constraints, her choice of lifestyle was limited to marriage or to living alone.

After the development and acceptance of the pill, one of society's rationales for limiting sex to marriage began to crumble. Women had incorporated moral codes which mandated that "nice" young girls do not engage in sexual activity outside of marriage. The burdens of an unwanted pregnancy were too severe. The pill dramatically reversed the moral code of "nice" young girls. It forced individuals, especially women, to make personal choices about their intimate affairs

[38] Teal, The Gay Militants, 291 (1971). The author notes that one of the grounds for opposition to homosexual marriage is that homosexuals ought not model their lives on bourgeois ideals.

and living arrangements. In truth, society's prohibition against sexual activity before marriage was only partially dependent on the possibility of unwanted pregnancy. Another aspect of the rationale, a psychological one, escaped and still escapes most women. The prohibition against premature intimacy operated to retard the intensity of emotional involvement between young couples. It allowed couples time before they made serious emotional investments in one another.

Greater sexual freedom has thus been woven into our modern social fabric. What response has the law made? The first legal change was in the area of birth control and was made after the pill became widely available. The United States Supreme Court struck down restrictive statutes, such as those in Connecticut and Massachusetts, which prohibited the sale and use of birth control devices and the dissemination of birth control information.

The first birth control case reached the United States Supreme Court in 1965, and involved the Executive Director of Planned Parenthood in Connecticut and a professor at Yale Medical School as criminal defendants. They had been convicted of violating the Connecticut anti-birth control statute by prescribing and disseminating birth control information and devices. The convicted defendants carried their cause to the United States Supreme Court in the now famous *Griswold v. Connecticut* case.[39] The Court found in favor of the defendants and struck down the restrictive birth control statutes as violative of the United States Constitution. Its decision carved out a zone of marital privacy in which the state may not impose undue burdens and restraints on the intimate aspects of a couple's life. The state's authority to regulate morality—a claim Connecticut made in support of its anti-contraception statute—remained unquestioned. However, the state must limit its control to constituencies that it has a legitimate right to control and must use reasonable means to control those constituencies. The Supreme

[39] Griswold v. Connecticut, 381 U.S. 479 (1965).

Court of the United States declared that conduct engaged in by marital partners was not a legitimate target of control. At least as to birth control, marital unions were under a constitutionally guaranteed protection of privacy beyond the reach of state interference.

The next birth control issue was decided by the Court seven years later in *Eisenstadt v. Baird.*[40] Baird had been convicted in Massachusetts of violating a statute imposing criminal penalties for selling or giving away contraceptives to unmarried persons. Baird had given a lecture on birth control. At its conclusion, he gave a young unmarried woman a package of vaginal foam, apparently as a sample of one kind of contraceptive. He was arrested and subsequently was convicted by the Massachusetts state court. The United States Supreme Court found that Massachusetts violated the equal protection clause by forbidding access to contraceptives on the part of unmarried persons while making them available to married persons. The Court found that the criminal statute bore no rational relation to any conceivable legitimate state purpose. Again the Court emphasized the individual's right to privacy: "If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or to beget a child."[41]

The right of access to birth control allowed women greater freedom in selecting a personal life style. That freedom was expanded when the Supreme Court sanctioned a limited right on the part of a woman to abortion.[42] The Court's vindication of lifestyle freedoms in the reproductive

[40] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[41] *Id.* at 453.

[42] Roe v. Wade, 410 U.S. 111, 113 (1973). For comments on the abortion decisions see Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 YALE L. J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases,* 1973 SUP. CT. REV. 159; Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process,* 23 U.C.L.A. L. REV. 689 (1976); Note, *Beal, Maher and Poelker: The End of an Era?,* 17 J. FAM. L. 49 (1978-79).

area is reasoned and desirable. It provides individuals with greater freedom, while at the same time fostering concern for responsible parenthood. With the help of the abortion decisions, procreational freedom has developed rapidly over recent years. Certain procreational taboos, such as state criminal sanctions against adultery and incest, still exist, but these sanctions are sluggishly enforced and are essentially meaningless. Rarely, if ever, is an individual prosecuted for violating them. The laws remain on the statute books as testimony to society's historical disapproval of certain behavior. The lack of enforcement underscores the fact that society no longer perceives the need to protect itself against such threats.

VI. CONCLUSION

The current law reflects the evolution in traditional morality. Society is re-evaluating behavioral standards and social values. The law is serving several purposes: it is vindicating a changed set of behaviors for the community as a whole, while at the same time it is reinforcing approval of such behaviors for the individual. The law has yielded; in part it has enlarged its tolerance of different lifestyles.

Prohibitions have been eased against lifestyles that in prior times were considered unorthodox.[43] The result may be to disturb traditional order. Disturbing traditional order is always serious business and ought not to be too quickly labeled as progress. The changing concepts promote greater individual autonomy which, if carried to its ultimate conclusion, may become undesirable. Individual autonomy in its extreme may be antithetical to family integrity. It may be humane to encourage a freer attitude toward individuals who live in a broader fashion; but, it may not be humane to embed unexamined changes into the social fabric if to do so wounds the familial unit essential to social organization. The family serves a pivotal and comforting function in America. In its ideal, it is a "haven in a heartless world,"[44] protecting

[43] Clark, *The New Marriage,* 12 WILLAMETTE L. J. 441, 452 (1976).

[44] *See* C. LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED (1977).

and educating the young and providing for an orderly transmission of societal values to them. For adults, the family provides emotional, social, and sexual satisfaction. Family structure is a source of society's strength.

The family may be in need of change but not abandonment. Will the law completely support the new cultural imperative which favors individuality over social and family structure? To a limited extent it has done so. It has recognized property rights outside of de jure marriage; it has increased its tolerance of illegitimate children; and, it has provided greater freedom to individuals in reproductive matters. So far, the law has drawn the line this side of homosexual marriage. While it is socially desirable for consenting adults to share maximum freedom, it is problematic whether it is desirable for the law to declare complete freedom as its credo.

LEGAL ESSAY

MARRIAGE LICENSE FEES: ARE THEY CONSTITUTIONAL?

by Walter E. Harding and Martin R. Levy*

Marriage license fees as applied to indigents in states that do not recognize common law marriage are suspect under the Due Process and Equal Protection Clauses of the fourteenth amendment, in that imposition of a fee that some persons, *i.e.*, indigents, are unable to pay deprives that class of the free exercise of a fundamental right.

In *Zablocki v. Redhail*,[1] the Supreme Court held that a Wisconsin statute that imposed an economic requirement as a precondition to marriage on certain Wisconsin residents was unconstitutional as violative of the Equal Protection Clause. The statute in that case required residents who had an obligation to support "minor issue" of prior marriages or liasons, who were not in their custody, to prove that they were supporting the children in question as a precondition to obtaining a marriage license.

The Court in an opinion by Mr. Justice Marshall, found that the state objectives, though laudable, would not pass "strict scrutiny" under the Equal Protection Clause. The Court quoted *Califano v. Jobst*[2] for the proposition that states may enact "reasonable regulations which do not significantly interfere with decisions to enter the marital relationship" but held that the state may not erect a direct legal obstacle to individuals desiring to marry.[3]

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[1] 434 U.S. 374 (1978).

[2] 434 U.S. 47 (1977).

[3] Zablocki v. Redhail, 434 U.S. 374, 386 (1978).