

BODENHEIMER MEMORIAL LECTURE

The Role of Court and Legislature in the Growth of Family Law

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It is a great pleasure to participate in this occasion honoring the memory of Professor Brigitte Bodenheimer. During the years since her death the statute on child custody jurisdiction which she principally drafted has received the ultimate seal of approval by being enacted in all states of the United States. A statute embodying the same principles has been passed by Congress, thus applying those principles throughout the Nation. During those years her scholarship has become authority, as it should be, for courts construing both statutes. It is indeed a matter of great sadness for all of us that she did not survive to see her work so universally recognized.

In light of Professor Bodenheimer's work on law reform, it seemed appropriate in this talk to explore some of the processes through which the law of domestic relations has developed over the past two decades. These processes are especially interesting in illustrating some of the changing relationships between courts and legislatures which have developed out of these institutions' attempts to deal with the rapidly changing social conditions of the latter part of this century.

That the law of domestic relations has grown in sheer quantity can hardly be questioned. One or two obvious measures of that growth are enough to make the point. As a very rough indication of growth we

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might look at the volume of case law which is currently being churned out by the Nation's courts in comparison with the volume of twenty years ago. In 1966 the West Digest covering ten years for the topic "Divorce" contained 949 pages of case headnotes. In 1981 the West Publishing Co. reduced the period covered by their digests from ten years to five years. The Digest published in that year for the topic "Divorce" contained 1141 pages of case headnotes. We can thus fairly conclude, without too much over-simplification, that courts today are deciding more divorce cases in a five-year period than they did twenty years ago in a ten-year period.

Making a similar comparison of legislative output is more difficult. The 1988 size of the California Family Law Act and its case annotations reveals that it has expanded by fifty percent over its 1970 size. Although I have not made a similar comparison of other states' statutory compilations, I have a strong impression that there has been comparable growth in legislative regulation of domestic relations in all heavily-populated states. We are now also seeing a substantial amount of federal domestic relations law for the first time in our legal history.

Even allowing for population increases which have occurred during this period, the increase in case law and legislation represents substantial expansion in state and federal regulation of divorce. If a similar calculation could be made of other aspects of family law (such as adoption or paternity suits), I am confident that similar expansion would be found.

Of course, it is more important that the growth of the law has significantly changed the form and content of family law. There can be no doubt that this has occurred, even though it cannot be demonstrated by counting pages. I shall try to establish the magnitude of some of these changes during this Lecture. Examples are easy to find and include the introduction of nonfault divorce, changes in the legal status of married women, the law of abortion, the status of illegitimate children, the law of custody and child support, and the application of constitutional principles to many aspects of domestic relations.

Historically, the fundamental rules of domestic relations have largely been statutory. For example, it is hornbook law that the existence of and grounds for divorce must be provided by statute. Marital property may only be divided and alimony may only be awarded pursuant to statute. Entry into marriage, with the exception of common-law marriage (now abolished in most states), and the qualifications for marriage, are and always have been controlled by the various states' legislatures. Child custody and support are exceptions, originating in the ecclesiastical law and later in the common law, but they today are

equally statutory subjects.

Much of the growth in domestic relations law which has occurred since 1968 has likewise been the product of legislative activity. An obvious example is the enactment in all states of one or another nonfault ground for divorce. New institutional factors were influential in the enactment of these statutes. Both policy guidance and drafting models were available to the state legislatures as they contemplated revising their divorce laws. Studies such as the 1966 *Report of the Governor's Commission on the Family in California*¹ and the 1964 *Report of the Mortimer Commission in England*² contained material amply supporting the need for extensive changes in the grounds for divorce. The Commissioners on Uniform State Laws provided a useful drafting model for legislatures wishing to implement the new policies by promulgating in 1970 the Uniform Marriage and Divorce Act.³ That Act proposed that divorce be granted on the single ground that the marriage is irretrievably broken.⁴ Although the Uniform Act as a whole has not been widely adopted, the marriage breakdown ground for divorce now exists in thirty-three states,⁵ and the Act is a major reason for the change.

During the 1950s and 1960s scholars and judges made frequent appeals for the establishment of state agencies to help legislatures do their work, sometimes on the pattern of the British "ministries of justice."⁶ Divorce law was not usually referred to as the branch of legislation most in need of revision, even though statutory obsolescence and new social or technological developments demanded statutory treatment. The *Commission Reports* I have referred to and the work which went into the Uniform Marriage and Divorce Act seem to have performed for state legislatures the functions which the commentators thought were so badly needed if legislation were to serve its purposes. It is an encouraging sign of the vitality of our legal system that, at a time when divorce reform was recognized as long overdue, existing institutions

¹ REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY IN CALIFORNIA (1966).

² THE REPORT OF A GROUP APPOINTED BY THE ARCHBISHOP OF CANTERBURY IN JANUARY 1964, PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY (1966).

³ UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. 147 (1987).

⁴ *Id.* § 302, at 181.

⁵ 2 H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 14.6 (2d ed. 1987).

⁶ See, e.g., Friendly, *The Gap in Lawmaking — Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 802 (1963).

were able to help the legislatures effect the changes.

The enactment of a nonfault ground for divorce provides a humbling illustration that those of us who participate in drafting or enacting a statute sometimes cannot fully appreciate how courts will construe our handiwork. It seems clear that some of those who drafted or helped to enact the marriage-breakdown ground for divorce thought that it would have the virtue of enabling trial judges to deny divorce in appropriate (but unspecified) cases. The comments to the Uniform Act guardedly hint that this was its intent.⁷ In practice, of course, the effect of this ground for divorce has been quite different from this expectation. The trial courts have generally treated it as requiring them to grant the divorce to either party on that party's demand, regardless of the other spouse's objection that the marriage has not broken down. The few appellate courts who have been asked to face the issue have decided it the same way.⁸

Two distinguished scholars have recently criticized this application of the marriage-breakdown ground for divorce, although neither of them seems to advocate a return to the old fault grounds, nor does either seem to contend that this is an erroneous construction of the statutes. Professor Lenore Weitzman has argued that nonfault divorce deprives wives of a bargaining position for the property and alimony which they formerly enjoyed when divorce could officially be granted only on proof of fault.⁹ Professor Mary Ann Glendon agrees with this position, but she also takes a more fundamental position. She says that marriage-breakdown divorce conveys the message that in America, marriage is an essentially transitory relationship which lasts only while both spouses find it self-fulfilling and which may then be terminated by either at will.¹⁰ This message, she says, produces a decline in responsible attitudes toward spouses and children and particularly says to women that they are making a mistake in devoting their lives to their children's care.¹¹

A question worth asking, assuming that these criticisms are well-founded, is whether either legislatures or courts have the capacity to change the law sufficiently to account for these criticisms. Changes ade-

⁷ The comment to § 302 of the Act, 9A U.L.A. 182 (1987), states that "the second provision [of this section] retains all the judicial discretion to weigh all the evidence bearing upon the death of the marriage which was envisioned in the original draft of this section. . . ."

⁸ See, e.g., *Weeks v. Weeks*, 124 N.H. 252, 469 A.2d 1313 (1983).

⁹ See L. WEITZMAN, *THE DIVORCE REVOLUTION* 13, 14, 371-77 (1985).

¹⁰ See M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 108 (1987).

¹¹ See *id.* at 111.

quate to meet the criticisms of Professors Weitzman and Glendon would require that marital fault be reintroduced for financial issues of divorce and that courts be given the authority to deny divorce when one spouse wished to preserve a marriage, perhaps on some basis such as "hardship." Do these legal institutions have the flexibility to change the law so soon after fundamental and extensive reforms? The traditional view of statutory lawmaking is that lawmakers may amend statutes at any time and for any reason as long as they do not violate constitutional doctrines. As a practical matter, however, substantial reasons exist for lawmakers not to amend statutes which have been the product of extensive consideration and public discussion. Thus, in this situation it seems highly unlikely that many state legislatures would restore such an unworkable factor as marital fault to the issue of marriage dissolution. Some states have retained fault for property and maintenance issues in divorce, and when this is the case, Professor Weitzman's criticism can be met by sensitive judicial handling of those issues. This example illustrates the point that, at least in domestic relations, it may be no more practical to amend statutes than to overrule cases. An effective response to Professor Glendon's criticism of marriage-breakdown divorce would require courts to construe statutes to permit highly discretionary judgments about when divorce should be granted and when denied, without the help of any statutory standards. This requirement would necessitate judicial rewriting of the statutes, not a step most courts would be anxious to take.

Another way to meet criticisms about the financial impact of divorce on nonworking spouses of long-term marriages is to develop statutory formulas that divide property and award maintenance based on the model of child support guidelines discussed in this Lecture. The relevant factors for these awards are not much more numerous or difficult to calculate than the factors for child support awards. The law at this stage of American society can hardly force an errant spouse to continue living with his or her spouse, but it can provide some financial protection for the rejected spouse through statutory formulas. I do not for a moment assume that this protection could be achieved without a major political struggle, but that struggle is the price we pay for substituting bright statutory lines for highly discretionary judicial action. Now that judicial selection has become a politicized process, the reliance upon statutory change may involve no greater political risks than continuing to rely upon judges' discretion for financial awards.

In the case of marriage breakdown one can characterize statutes as substituting an honest approach to divorce for the courts' earlier devious manipulation of cruelty as a ground for relief. Other statutory

changes have had different purposes. For example, in 1981 the United States Supreme Court held in *McCarty v. McCarty*¹² that military pensions were not, under the federal statute then in force, marital property which could be divided on divorce.¹³ I think one can fairly say that not only did this decision inflict hardship on divorced spouses of service personnel, but also that it did so unnecessarily, since the Supreme Court could easily have construed the statute to include these pensions as marital property. The following year Congress passed the Uniformed Services Former Spouses' Protection Act of 1982,¹⁴ which overruled the *McCarty* case and authorized military pensions to be included in marital property, with certain limitations.¹⁵ The utility of having legislative means to correct erroneous judicial decisions is especially obvious in this kind of case, since the error is clear, it originated in a statute not as clear as it might have been, and the correction, even with its qualifications, is easily understood. The result is a neat solution to a clear problem — a good example of the traditional relationship between courts and legislatures.

Correcting the mistakes which unclear statutes lead courts to make is not always so easy. The federal statute with the cumbersome name of Employee Retirement Income Security Act of 1974¹⁶ (ERISA), when enacted, contained language which seemed to state clearly that the private corporate pensions regulated by the Act were not transferable to the spouses of covered employees on divorce.¹⁷ A scattering of lower courts disagreed on whether to construe the Act this way.¹⁸ If it were so construed, the Act effectively would often exclude from marital property on divorce the most important and valuable asset acquired by either spouse during the marriage — a case similar to military pensions. However, an additional difficulty exists here. If any divorce court could enter any order concerning a private pension that seemed fair in the

¹² 453 U.S. 210 (1981).

¹³ *See id.*

¹⁴ Pub. L. No. 97-252, 96 Stat. 730 (1982) (codified as amended in scattered sections of 10 U.S.C.).

¹⁵ *See* 10 U.S.C. § 1408 (1982 & Supp. IV 1986).

¹⁶ Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of Titles 5, 18, 26, 29, 31 and 42).

¹⁷ *See* 29 U.S.C. § 1056(d)(1) (1982); *see also* I.R.C. § 401(a)(13) (1988).

¹⁸ *Compare* *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (1980), *cert. denied*, *Seafarer's Int'l Union v. Stone*, 453 U.S. 922 (1981) *with* *Francis v. United Technologies Corp.*, 458 F. Supp. 84 (N.D. Cal. 1978). For additional information, see Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA*, 25 UCLA L. REV. 417, 511-22 (1978).

divorce context, this action would often interfere with the orderly administration of the pension fund.

Congress' solution, in the Retirement Equity Act of 1984¹⁹ (REA), was to permit the division of private pensions on divorce, but to require that the divorce decree ordering the division be approved by the administrator of the pension fund, pursuant to some quite complex qualifications.²⁰ That the statute merely set the courts straight about a simple matter of construction was not enough. It was also necessary to provide a procedure to protect both other people's interests and the pension fund itself. This protection was accomplished by falling back on a device from the 1930s — the administrative agency — with the novel difference that the administrative agency was a private individual instead of a government officer. As with other administrative agencies, the creation of this agency has spawned a new and technological body of legal learning for divorce lawyers concerning what are called Qualified Domestic Relations Orders or QDROs. The statutory solution to private pension transfer on divorce has been to bypass the statutory courts concerning the details of the transfer in favor of a private pension fund administrator. Congress in this situation was able to accomplish something which the courts could not effectively accomplish by themselves.

Perhaps the most striking institutional change in domestic relations law during the past twenty years has occurred in the support of children, whether born in or out of wedlock. Before 1984 child support was handled by the courts in the traditional manner. A trial judge's discretion determined the amount of support, and courts enforced the support order by execution and theoretically also by contempt. In practice, courts seldom imposed the contempt sanction.

This system produced generally inadequate awards which were largely not paid or not fully paid. Enforcement was ineffective, and the response again was legislative. The response came from Congress, thus transforming child support's traditional state character into a predominantly federal subject. By conditioning Federal Aid to Families with Dependent Children (AFDC) grants on states' compliance with federal statutory child support regulations,²¹ Congress ensured a national child support system. The system included both the determination of the

¹⁹ Pub. L. No. 98-397, 98 Stat. 1426 (1984) (codified as amended in scattered sections of 26 U.S.C., 29 U.S.C.).

²⁰ See 29 U.S.C. § 1056 (d)(3) (1982 & Supp. IV 1986); see also I.R.C. § 401(a)(13)(B) (1988).

²¹ See 42 U.S.C. § 601, 652 (1982 & Supp. IV 1986).

child support amount (by requiring each state to adopt child support guidelines),²² and the enforcement of child support orders through such innovations as mandatory wage withholding provisions in child support decrees and application of income tax refunds to child support obligations.²³ Like the pension legislation, this statute brought administrative agencies into child support enforcement. The most important such agency is the local office of child support enforcement, which represents the state, or in some instances, the child's custodian, in bringing enforcement proceedings in the courts. Although courts nominally retain their traditional functions in establishing and enforcing child support orders, those functions in practice have been drastically reduced.

The guidelines established by state statute pursuant to the Federal Act are for practical purposes becoming the measure of child support in most cases, thus sharply limiting courts' discretion. Recent congressional legislation endorses this practical tendency by providing that the amount of child support computed under the guidelines presumptively be the amount to be awarded.²⁴

Courts must also enter enforcement orders, but here as well they are given very little discretion. Under the previously mentioned legislation, mandatory wage withholding is extended to all cases, with a few exceptions.²⁵ Since the defenses permitted in entering or in enforcing income withholding orders are severely limited, courts are being relegated to the position of low level administrative agencies.

Lawyers in child support cases are likewise seeing their functions reduced to computing child support under the applicable guidelines. Negotiation of child support has largely been curtailed, since it is a foregone conclusion that if litigated a court will likely award the amount dictated by the guidelines. This tendency is perhaps an unforeseen consequence of substituting precise statutory rules for highly discretionary judicial authority.

The legislative preemption of control over the amount and enforcement of child support has been applauded as a progressive step in solving a serious social problem. Whether this belief turns out to be accurate depends on (1) whether states provide enough funds to support

²² See 45 C.F.R. §§ 302.53, 302.56 (1987).

²³ See 42 U.S.C. §§ 651-665 (1982 & Supp. IV 1986).

²⁴ See Family Support Act of 1988, Pub. L. No. 100-485, § 103, 102 Stat. 2343, 2346-48 (1988) (amending 42 U.S.C. § 667(b)). This legislation provides that the guidelines shall be applied by the judges unless a finding is made that there is good cause for not applying the guidelines. *Id.*

²⁵ See *id.* § 101(a) (amending 42 U.S.C. § 666(b)).

effective enforcement by state agencies responsible for that task; and (2) whether some process is established through which the levels of child support can be adjusted from year to year to account for economic changes. These steps have been taken in some states but not in others. The amendments necessary to adjust this complex statutory scheme to our rapidly changing economic and social system will certainly test most state legislatures' efficiency. In addition, the level of financial support currently being furnished to some states' child support enforcement agencies does not offer much prospect that a major proportion of outstanding decrees will be enforced.

The legislative activity so far described has reduced the discretion of courts to deal with stubborn family law problems. The Uniform Child Custody Jurisdiction Act²⁶ (UCCJA) and its sibling the Parental Kidnapping Prevention Act of 1980²⁷ (PKPA) entail a different relationship between legislatures and courts. Before the enactment of these laws, jurisdiction over custody cases and interstate recognition of custody decrees were wholly matters of judicial decision. The decisions permitted such a wide range of criteria for authority to enter custody orders that forum shopping was common. The custody decisions of one state were too often modified by other states' courts. Although the two statutes contain a long list of statutory policies (some of them inconsistent with each other), one can fairly say that their overriding purpose was to eliminate forum shopping and as far as possible reduce interstate revision of custody decrees.

They attempt to achieve this purpose in two ways. First, Congress reduced the bases for jurisdiction to enter custody decrees, for most practical purposes, to two. A child's home state may enter such orders, and the state having a "significant connection" with the child and her parents may also enter the orders if the child's best interest is that the court assume jurisdiction. Second, the statutes generally forbid a second state from revising the custody order of the first state while the first state continues to have jurisdiction of the case. Both statutes contain complex interrelated provisions qualifying the circumstances in which courts may decide custody disputes.

In our legal tradition statutes have usually been viewed as establishing general rules, the application of which is left to courts. The UCCJA and the PKPA are within that tradition, although they present especially challenging tasks of application to the courts. This challenge

²⁶ 9 U.L.A. part I, at 115 (1988).

²⁷ Pub. L. No. 96-611, § 8(a), 94 Stat. 3566, 3569-74 (1980) (codified as amended at 28 U.S.C.A. § 1738A (West Supp. 1988)).

is because their standards for jurisdiction are sufficiently general to require careful exercise of judgment in their application, and because those standards are subject to qualification through such doctrines as unclean hands, forum non conveniens, and above all, the best interests of the child. In addition, courts must always face problems of construction created by the interaction between these two statutes. Because of the mobility of our population, nearly every custody case requires courts to be concerned with the impact of either or both of these statutes.

The UCCJA and the PKPA present courts with a dilemma which, so far as I am aware, is unique. The Supreme Court created the dilemma in the case of *May v. Anderson*,²⁸ decided in 1953 and never subsequently overruled. The Court in *May v. Anderson* held that a custody decision, to satisfy due process clause requirements entitling it to enforcement in all states, must be based in all cases on personal jurisdiction,²⁹ although in many cases personal jurisdiction will obviously exist. Professor Bodenheimer was perfectly aware of *May v. Anderson* when she worked on the UCCJA. She recognized the problem it created, but she also recognized that, to the degree any statute required personal jurisdiction in all cases, it would be unworkable. Personal jurisdiction will at times be unobtainable in situations in which it is nonetheless essential to enter a custody order. She therefore omitted any requirement of personal jurisdiction from the statute, and the requirement was likewise omitted from the PKPA. I might add that a substantial number of state court cases explicitly refuse to follow *May v. Anderson*.

Many of my students express bewilderment and disbelief when I introduce them to a situation in which a jurisdictional rule laid down by the Supreme Court on constitutional grounds is ignored by two statutes — one statute enacted in all states and the other by Congress. The situation is certainly not an example of the interaction between courts and legislatures that one would expect to be commended in a casebook on the American legal process. My own sympathies in this conflict lie with the statutes' drafters. They were attempting to construct a workable national law of custody in the face of a Supreme Court decision that was not based on precedent and that lacked comprehension of the complex interests in custody cases.

As I have tried to demonstrate, state and federal legislatures have made important contributions to domestic relations law over the past

²⁸ 345 U.S. 528 (1953).

²⁹ See *id.*

twenty years. During the same period courts have not been idle. One can attribute much of the sheer volume of law to the advent in most states of intermediate courts of appeal and to the determination of lawyers to appeal their cases to these courts. The result is a vast body of decisions having little or no general significance and concerned largely with reviewing facts and trial courts' evaluations of those facts. It is difficult to understand how the amounts of property involved in so many of these cases can justify the appeals, or, in custody disputes, how the parties can afford the costs. One can fairly attribute a non-inconsiderable amount of increased litigation to courts' decisions, and particularly to United States Supreme Court decisions.

The courts' qualitative contribution to the growth of family law has come principally from the development of constitutional doctrine. To some extent constitutional doctrine was preceded by statutory changes, thus making such constitutional principles as the abolition of gender discrimination in the allocation of support obligations almost an anticlimax. Even such an important event as the legalization of abortion was somewhat accomplished in several states, some years before *Roe v. Wade*,³⁰ by statutes which partially relied on the Model Penal Code.³¹ However, one cannot deny that the development of new constitutional doctrines has increased the volume of judicial decisions which elaborate the new doctrines while simultaneously limiting the scope of legislative activities.

The most highly publicized of the constitutional developments has of course arisen out of *Griswold v. Connecticut*,³² the case which finally invalidated the obsolete Connecticut statute forbidding contraceptive use. Whatever one may think of that case's reasoning, the Court's surrounding the institution of marriage with a penumbra of privacy³³ suggested that marriage might no longer be the most extensively regulated of all human relationships. Justice Douglas' opinion seemed to set some vague limit to what John Selden complained of in the seventeenth century: "Of all actions of a mans life, his marriage does least concerne other people, yet of all accons of our life tis most medled with by other people."³⁴

Just as the marriage-breakdown statutes had consequences unforeseen by their drafters, *Griswold's* subsequent history has not been what

³⁰ 410 U.S. 113 (1973).

³¹ MODEL PENAL CODE § 230.3, 10 U.L.A. 566 (1974).

³² 381 U.S. 479 (1965).

³³ See *id.* at 484-86.

³⁴ J. SELDEN, TABLE TALK 75 (F. Pollock ed. 1927).

one might have anticipated from an initial study of the opinion. The Supreme Court has several times reaffirmed the *Griswold* holding that a right of privacy surrounds marriage,³⁵ and it has partially relied on that principle to invalidate an unusually foolish Wisconsin statute that prohibited issuing a marriage license to one in violation of a prior child support decree.³⁶ However, aside from this and a few other cases,³⁷ *Griswold* has not resulted in any broad invalidation of state regulations governing the qualifications to marry, the entry into marriage, or the obligations of spouses to each other or to their children.

The real thrust of *Griswold* and the right to privacy which it created has been in two directions: one conventional and limited and the other unforeseen and expansive. As anyone might have predicted, the case has been used to invalidate other limitations on contraception, both in and out of marriage,³⁸ and some state courts have extended its principle to invalidate other restrictions on sexual conduct.³⁹ That the Supreme Court does not view *Griswold* as imposing broad limits upon the regulation of sexual conduct, however, has been shown by its curious decision in *Bowers v. Hardwick*.⁴⁰ In that case the Court held that Georgia's criminal sodomy statute was not unconstitutional when applied to the private conduct of consenting adult homosexuals.⁴¹ The opinion contains very little supporting analysis and chiefly relies on our society's historical predisposition to condemn this kind of conduct. The case provides another example of the Supreme Court's penchant for abrupt retreat from earlier sweeping positions. It leaves state legislatures and courts doubting whether they may regulate other sexual conduct in and out of marriage.

The unforeseen, and perhaps unforeseeable, application of *Griswold's* right to privacy has been the *Abortion Cases*, beginning with *Roe v. Wade*,⁴² decided eight years after *Griswold*. Aside from questioning whether the right to privacy was an appropriate doctrine to upset state abortion laws, the *Abortion Cases* constitute a major change in how courts make law. *Roe v. Wade* and the later cases which follow it more closely resemble statutes than traditional judicial opinions. Al-

³⁵ See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

³⁶ See *Zablocki v. Redhail*, 434 U.S. 374 (1978).

³⁷ For examples and discussion, see 1 H. CLARK, *supra* note 5, § 2.2.

³⁸ See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

³⁹ See, e.g., *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977).

⁴⁰ 478 U.S. 186 (1986).

⁴¹ See *id.*

⁴² 410 U.S. 113 (1973).

though the decision obviously invalidated prior attempts to forbid or to restrict abortion in certain circumstances, its main impact was to direct clearly for the future that states were not to place insuperable obstacles to a woman's abortion choice. Like a legislative enactment, *Roe v. Wade* set quite specific future limits on the time and manner of permissible regulation of abortion. As the anti-abortion forces in the United States have exercised their very considerable ingenuity to devise statutes and ordinances to make abortions difficult or impossible to obtain, the Supreme Court has handed down other opinions which would require only a few changes to resemble typical statutes.⁴³ To legal traditionalists this action may seem like a perversion of the Court's function. Once the Court made the original judgment, however, it had little choice if it were to vindicate its decision that a fundamental constitutional right was at stake. One also seems unable to find reasons why the Court, faced with new social conditions and new problems, should not adopt new techniques for deciding cases and writing opinions. Surely the common law of constitutional adjudication should be capable of this much growth, especially since the growth has mostly been consistent in protecting a women's procreative freedom.

The *Abortion Cases* have the virtue which well-drawn statutes have of giving reasonably clear directions for future law. The Supreme Court in other family law decisions has not been as lucid. In 1968 the Court held unconstitutional Louisiana's wrongful death statute which state courts had construed not to permit an illegitimate child to recover for his mother's death.⁴⁴ The Court reasoned that the distinction between legitimate and illegitimate children for this purpose violated the fourteenth amendment's equal protection clause. Many of us thought this decision meant that the Court was condemning all invidious discrimination against illegitimate children — a result which we applauded. One could certainly have so read the opinion.

Not long afterwards the Court showed us that we were mistaken. In 1971 we were taught that an inheritance statute could validly discriminate between legitimate and illegitimate children.⁴⁵ In 1977 the Court held unconstitutional an Illinois statute which provided that illegitimates could inherit from their mother but not from their father; however, the decision did not appear to overrule the earlier inheritance de-

⁴³ See, e.g., *H.L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979).

⁴⁴ See *Levy v. Louisiana*, 391 U.S. 68 (1968).

⁴⁵ See *Labine v. Vincent*, 401 U.S. 532 (1971).

cision.⁴⁶ One year later the Court upheld a New York statute which provided that illegitimate children could inherit from their father only if a court proceeding before the father's death had established paternity.⁴⁷ This decision again did not appear to overrule any of the prior cases.⁴⁸

We are accustomed to the principle that legislatures may enact statutes without regard to logical consistency as long as those legislatures do not violate any constitutional provisions. We are also accustomed to the principle of *stare decisis*, that judicial decisions should exhibit at least some consistency with each other. If one reads the Supreme Court's decisions on inheritance by illegitimates, that person finds the same lack of logical consistency which normally characterizes statutes. The Court was apparently influenced by distinctions between rights of inheritance and other rights contingent on death, and by fine distinctions between the statutes of one state and those of others. However, unlike most statutory regulation, no perceptible policy rationale guides its decisions. Since the underlying principle of these cases is difficult to discern, lower courts in future cases and legislatures seeking to enact valid and workable inheritance statutes are left with little guidance. Ten years of constitutional litigation certainly ought to produce more coherent results than this.

Part of the difficulties the *Illegitimacy Cases* create arises from the Court's refusal to overrule its inconsistent earlier decisions. This same refusal has created confusion in the related line of cases dealing with illegitimate children's fathers' constitutional rights to obtain custody and to prevent their children's adoption. The first such case seemed to give these fathers the same rights that fathers of legitimate children have.⁴⁹ Subsequent cases limited unwed fathers' rights without providing a satisfactory rationale for these limitations and without overruling the prior cases.⁵⁰ Thus, presently determining with assurance what rights unwed fathers have is impossible. One reason for the confusion is that the Court has been unable either to understand or to accept the necessities of workable adoption procedure as it applies to unwed fathers. With this line of cases the Court has greatly increased the incidence of family law litigation and, in that quantitative sense, has contributed unnecessarily to the growth of this area of the law.

⁴⁶ See *Trimble v. Gordon*, 430 U.S. 762 (1977).

⁴⁷ See *Lalli v. Lalli*, 439 U.S. 259 (1978).

⁴⁸ See *id.*

⁴⁹ See *Stanley v. Illinois*, 405 U.S. 645 (1972).

⁵⁰ For examples and discussion of these cases, see 1 H. CLARK, *supra* note 5, § 21.2.

The Court has produced the same effect in an even more fundamental aspect of the law by the famous, or perhaps I should say the infamous, *Kulko v. Superior Court*⁵¹ decision. That case held that a father could not be sued in California for his children's support even though he had consented that they move there from New York to live with their mother, his ex-wife.⁵² Using the current jargon of personal jurisdiction the Court said that this interaction did not create sufficient contacts between the father and California to subject him to personal jurisdiction in that state.⁵³ The Court also said that the children's father had not "purposely availed himself" of the "benefits and protection" of California's laws by sending his children there.⁵⁴ One should contrast this decision with the earlier case in which the Court held an insurance company personally subject to California's jurisdiction in an insurance policy suit when the company's only contact with the state was its mailing of a policy to a person living in California and that person's payment of the premiums.⁵⁵ Apparently sending an insurance policy into a state has greater significance than sending one's children there.

Whatever the implication, the *Kulko* case has created many doubts about where suits for alimony or child support should be brought. This doubt is especially warranted in our society in which everyone constantly moves about and in which a defendant's "contacts" with a particular state may vary greatly from what has been found sufficient in other cases. The Court's proposed standards for determining the jurisdictional issue are so nearly meaningless that they offer no guidelines for deciding future cases. When this much uncertainty exists, courts will experience considerable litigation before plaintiffs can reasonably be sure where they must sue and before defendants may know where they must defend. In this Pickwickian sense the Supreme Court has contributed to the growth of family law. By creating confusion concerning where suits may be brought, it has generated litigation without perceptibly improving the condition of either parents or children.

I shall merely mention one final example of the relationship between courts and legislatures as an oddity. The California Supreme Court has held in *Marvin v. Marvin*⁵⁶ that some vague equitable right exists for an unmarried cohabitant to share in the property accumulated by the

⁵¹ 436 U.S. 84 (1978).

⁵² *See id.* at 85, 91-101.

⁵³ *Id.* at 94.

⁵⁴ *Id.*

⁵⁵ *See McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

⁵⁶ 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

other cohabitant during their relationship.⁵⁷ Several other cases in other states, such as *Watts v. Watts*⁵⁸ in Wisconsin, have followed *Marvin*'s creation of this equitable claim.⁵⁹ The oddity in these decisions is that both states' legislatures had abolished common-law marriage. It seems obvious that if the abolition means anything, it must mean that informal unions, whether or not they would have qualified as common-law marriages (as the *Watts* relationship apparently would have), should not carry the rights and obligations of marriage, including rights to property. By recognizing these unions, California and Wisconsin courts have effectively reinstated common-law marriage in their respective states after the legislatures had statutorily abolished that legal relationship. This reinstatement is without any of the safeguards which had helped to prevent fraudulent claims of common-law marriage. Neither opinion provides any authority to permit a court to override legislative action in this fashion.

As a student in my antitrust class once asked during the last hour of the course, "What does it all mean?" What *has* been the effect on family law of the activities of legislatures and courts over the past twenty years?

The legislation in domestic relations during the past two decades has made major changes in the law by substituting clear rules and efficient procedures for the discretionary processes of the common law. One can fairly say that statutes have corrected inequities and mostly reduced litigation. The adoption of a nonfault ground for divorce eliminated wasteful and essentially meaningless controversies about who in broken marriages was at fault and about the outdated defenses of connivance, collusion, and recrimination. Marriage breakdown divorce has also had the incidental benefit of largely eliminating migratory divorce, since one has little incentive to resort to a divorce-mill state when divorce is easily obtained at home.

Solutions to Professor Weitzman's objections to marriage-breakdown divorce⁶⁰ could be obtained by other statutory reforms. If child support guidelines are workable, alimony guidelines should equally be possible, thus reducing the uncertainty and financial hardships of divorce. Professor Glendon's criticisms of marriage-breakdown divorce⁶¹ cannot wholly be met by statutory changes without a fundamental change in

⁵⁷ See *id.*

⁵⁸ 137 Wis. 2d 506, 405 N.W.2d 303 (1987).

⁵⁹ See, e.g., *id.*

⁶⁰ See *supra* note 9 and accompanying text.

⁶¹ See *supra* notes 10-11 and accompanying text.

society's attitudes toward marriage — a change which would show a greater sense of commitment to marital relationships. I might add here that her comments seem to rest partially on the assumption that divorce is a bad thing. My own view is that many divorces are good things in the sense that they contribute to greater contentment with former spouses and their children. In any case, I do not suppose that many legislatures would wish to give courts broad discretion to deny divorce on some indefinite standard such as "hardship," nor would many courts wish to have that power.

Statutes dealing with child support can also potentially reduce litigation and establish clearly defined obligations between parent and child. They place the law on the side of family responsibility, and to that extent, they counteract the message of irresponsibility which Professor Glendon finds in marriage-breakdown divorce.

Although one can hardly say that the UCCJA and the PKPA have reduced litigation or established clearly defined rules concerning custody jurisdiction, they have caused a salutary reduction in forum shopping and in interstate conflicts between courts in custody cases. The amount of litigation created by these statutes may well decline as courts become more accustomed to respecting other state courts' decisions. The statutes thus seem to be accomplishing their major purpose even though they often pose questions of construction which many courts have difficulty resolving.

Legislatures have been most successful when they have attempted to deal with conflicts over property or money and the allocation of authority to hear cases. They are less successful when they address the emotional problems of divorce. The marriage-breakdown statutes have largely been a success because they avoid emotional conflicts. Less successful statutes which force courts to deal with emotional conflicts are those that impose presumptions favoring so-called joint custody and those that provide for grandparent visitations.

When we look at courts' domestic relations efforts compared with legislatures' efforts during the past twenty years, we see much more varied results. Courts have caused some significant changes. Examples include the abolition of spousal immunity in tort law and the expanded use of antenuptial agreements in divorce. However, these cases do not rest on constitutional principles, so that if they appear ill-advised, they may be corrected by legislation.

Most judge-made changes in family law have come during constitutional litigation. The *Griswold* Doctrine and the *Abortion Cases* are the most striking examples. As I have suggested, the *Abortion Cases* resemble legislation in their attempt to clarify what may and may not

be done to regulate abortion. It is remarkable how such a statute-like body of law could develop from *Griswold's* vague and cloudy beginnings.

The relationships between the Supreme Court's output and legislation is particularly interesting to any student of the judicial and legislative processes. It is not unfair to say that the Court's domestic relations efforts have too often made workable legislation virtually impossible, without enhancing any significant social policy or without reducing discrimination. The conflict between the UCCJA and *May v. Anderson* is the clearest example of this effect, but one may observe the same effect in the Court's decisions on illegitimate children and their parents' rights. The *Kulko* case is an egregious illustration of the unnecessary litigation generated by the Supreme Court's constitutional doctrines. An iconoclast might ask why, in this day of air travel, in which no part of the United States is more than a day away from any other part, a plaintiff should not be entitled to sue a defendant in the state in which that plaintiff resides on a claim as socially significant as child support, as long as the defendant receives notice and an opportunity to be heard.

If we ask whether the growth of domestic relations law has reflected any single public policy or philosophy of law, as other law reforms in this century, the answer seems to be negative. Some changes have been made to give people greater control over their domestic relations, as with non-fault divorce, the Supreme Court's *Griswold* and *Abortion Cases*, and the cases permitting antenuptial control of the financial aspects of divorce. Much law review advocacy exists to expand *Griswold's* influence and to give spouses greater control over their marriage relationships. Courts have mostly not responded to these arguments. The changes have generally been specific responses to what were regarded as deficiencies in the law or as forms of discrimination which ought to be removed. Greater freedom in contracting and in dissolving marriages has not followed. Despite all the changes, John Seldon would undoubtedly still find that the marital relationship is being too much "medled with." Whether or to what extent his complaint is justified, I leave to you.