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MARRIAGE: A "BASIC CIVIL RIGHT OF MAN"

HENRY H. FOSTER, JR.*

I. INTRODUCTION

Sir Henry Maine advanced the thesis that the movement of the progressive societies has hitherto been a movement from status to contract. He noted the gradual dissolution of family dependency and the growth of individual obligation in its place. "The individual is steadily substituted for the Family, as the unit of which civil law takes account," he said, and "[w]e seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals."

Although Maine's hypothesis, when made, had greater validity as an explanation for the breakdown of patriarchal cultures and the gradual substitution of principles of equality for those of subordination, recent decisions of the Supreme Court may support his thesis that traditional state control of the marital status has to give way to current notions of individual liberty and the right of privacy. In *Griswold v. Connecticut,* an "uncommonly silly law" for forbidding the dissemination of birth control information, for which justification was claimed due to the state's concern over extra-marital relations, was held to violate the penumbras emanating from the Bill of Rights as read into the Fourteenth Amendment. In *Loving v. Virginia,* miscegenation statutes were declared unconstitutional per se and marriage was characterized as a "basic civil right of man." Together, these two decisions raise a challenge to state regulation of marriage and the freedom to remarry after divorce. No longer may it be assumed that states have autonomy over rules and law governing marital status, for if marriage is a civil right, it is constitutionally protected. States' statutes and common law decisions are subject to federal re-examination and evaluation.

There are difficulties, however, with the classification of marriage as a "civil right." Historically, marriage has been regarded by the law as

2. See J. Bryce, Marriage and Divorce under Roman and English Law, in History and Jurisprudence 842 (1901).
3. 381 U.S. 479 (1965).
4. Id. at 527 (Stewart, J. dissenting).
5. 388 U.S. 1 (1967).
6. Id. at 12.
much more than a private or "civil contract," notwithstanding the familiar statutory use of the latter term. The term "status" is a more accurate description than the word "contract" insofar as the law and rules governing marriage are concerned. This has been so due to judicial and legislative recognition that there is a societal and religious concern over marriage and the family as well as a private interest in the incidents of marriage. If we look at primitive law, or at a modern civil code, we find that marriage, its incidents, and its termination, are subjects for extensive regulation. Anthropologists tell us that marriage and divorce are major events seized upon for rituals, for the transfer of wealth, and for various social and legal consequences.

The Anglo-American world by both canon and common law and by statute and decision continuously has asserted a social or state interest in the family, although there have been substantial differences from one age to another as to the form and content of regulation. From a broad perspective, however, there has indeed been a progressive movement from a status imposed by feudalism to a relative autonomy.

If we take a realistic view of the modern institution of marriage and the traditional regulation to which it is subject, it is obvious that marriage is not a constitutional right in the sense that free speech and freedom of the press, or freedom of religion, are constitutionally guaranteed rights. Because of history, and the public concern over the family, there presently is a greater area of permissible control. The exercise of state police power, however, is subject to constitutional limitations, no matter how difficult it may be to delineate the precise boundaries.

The decisions of the Supreme Court before Griswold and Loving are not too helpful in circumscribing the limits of state police power. Meyer v. Nebraska, it is true, in condemning an arbitrary interference with

8. See N.Y. Dom. Rel. Law § 10 which states "[m]arriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable in law of making a contract is essential."

9. It has been held that marriage is not a contract protected against impairment of obligations by the Constitution, Maynard v. Hill, 125 U.S. 190 (1888); Fearon v. Treanor, 272 N.Y. 268, 5 N.E.2d 815 (1936); and that marriage differs from ordinary contracts and is subject to regulation by law, Weinberg v. Weinberg, 255 App. Div. 366, 8 N.Y.S.2d 341 (4th Dep't 1938). One obvious difference from ordinary contracts is that the parties do not have a legal right to mutual rescission.

10. See R. Benedict, Patterns of Culture 32 (Mentor Book ed. 1957).


12. Obviously, there is a much broader area for state regulation of marriage than there is for state regulation of speech, the press, or religion. It commonly is said that the state is a party to a marriage, that the status is imposed by law, and that there is a public concern over marriage and divorce. E.g., Popham v. Duncan, 87 Colo. 149, 285 P. 757 (1930).

the parental right to have children instructed in other than the English language, concluded that the Fourteenth Amendment includes the right "to marry, establish a home and bring up children." Pierce v. Society of Sisters held unconstitutional, as an arbitrary interference with parental prerogatives, an Oregon statute forcing parents to send children to public rather than private or parochial schools. Skinner v. Oklahoma held invalid a compulsory sterilization of habitual criminals law. Of greater relevance is Reynolds v. United States, holding polygamy may be outlawed, and Maynard v. Hill sustaining the now obsolete phenomenon of legislative divorce. The purport of the latter two cases is that legislatures have a substantial if not unlimited authority to regulate marriage and divorce. The recent decisions of the Supreme Court, however, diminish such legislative authority and provide a basis for challenging the constitutionality of specific regulations. The Louisiana wrongful death cases, for example, held that neither an illegitimate child nor the mother of an illegitimate child could be deprived of the actions available to their legitimate counterparts because such constituted an "invidious discrimination against them" forbidden by the Equal Protection Clause. The admitted broad legislative discretion for social and economic legislation, and the fact that history and tradition supported the classification, were insufficient justification for an irrational discrimination that impinged upon basic civil rights.

II. The Basis for Constitutional Challenge

Prior to the unanimous opinion in Loving and the several opinions in Griswold, the most significant relevant decision was that in Perez v. Sharp, which held a California miscegenation statute unconstitutional.

14. Id. at 399.
15. 268 U.S. 510 (1925).
16. 316 U.S. 535 (1942), recognizing an individual and family right to procreate and have children.
17. 98 U.S. 145 (1878).
18. 125 U.S. 190 (1888).
19. Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968). Mr. Justice Douglas pointed out: "While a State has broad power when it comes to making classifications (Ferguson v. Skrupa, 372 U.S. 726, 732), it may not draw a line which constitutes an invidious discrimination against a particular class. See Skinner v. Oklahoma, 316 U.S. 535, 541-42. Though the test has been variously stated, the end result is whether the line drawn is a rational one. See Morey v. Doud, 354 U.S. 457, 465-66.

"In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications. . . . However that might be, we have been extremely sensitive when it comes to basic civil rights . . . and have not hesitated to strike down an invidious classification even though it had history and tradition on its side . . . ." 391 U.S. at 71 (emphasis and some citations omitted).
20. 32 Cal.2d 711, 198 P.2d 17 (1948).
Justice Traynor in the majority opinion found that the California statute violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and in a concurring opinion Justice Edmonds found that the statute denied freedom of religion as transmitted from the First to the Fourteenth Amendment.

Justice Traynor conceded that the regulation of marriage is a proper function of the state but insisted that a statute directed at a social evil must employ reasonable means to prevent that evil, and that a discriminatory and irrational law was unconstitutional. The personal liberty protected by the Fourteenth Amendment was held to include not merely freedom from bodily restraint "but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."\(^2^1\) Justice Traynor stated that "[m]arriage is thus something more than a civil contract subject to regulation by the state; it is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means."\(^2^2\) He also noted that the right to marry is the right of the individual, not of racial groups, and that since the essence of the right to marry is freedom to join in marriage with the person of one's choice, a segregation statute necessarily impaired the right to marry.\(^2^3\)

The permissible area of regulation, according to Justice Traynor, includes those matters of legitimate concern to the state. He cited an example where health reasons, such as the transmission of communicable diseases, justified denial of a marriage license, but even then, he argued, such legislation must be based on tests of the individual rather than on arbitrary classification.\(^2^4\) Finally, Justice Traynor held that the California miscegenation statute was too vague and uncertain to comport with the requirements of due process.

Justice Edmonds in his concurring opinion reiterated that marriage was a fundamental right of free men and also asserted that the right was grounded in the fundamental principles of Christianity and hence protected by the constitutional guarantee of religious freedom. Only a "clear and present danger," according to Justice Edmonds, could justify such legislation, and no such danger had been demonstrated.\(^2^5\)

\(^{21}\) Id. at 714, 198 P.2d at 18; see Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
\(^{22}\) Id. at 714, 198 P.2d at 18-19.
\(^{23}\) Id. at 715, 198 P.2d at 19.
\(^{24}\) Id. at 718, 198 P.2d at 21.
\(^{25}\) Id. at 741, 198 P.2d at 35.
The unanimous opinion in Loving, delivered by Chief Justice Warren, in general follows the rationale of Justice Traynor’s opinion in Perez. The Virginia miscegenation statute was held unconstitutional as an impermissible classification under the Equal Protection Clause and as a denial of liberty under the Due Process Clause of the Fourteenth Amendment. The Court rejected the argument that marriage has traditionally been subject to state regulation without federal intervention and hence was insulated by the Tenth Amendment. It was conceded that marriage is “a social relation subject to the State’s police power” but the Court refused to accept the contention that the statute could be upheld if there was any possible basis for concluding that it served a rational basis. In order to be sustained, a statute effecting a racial discrimination “must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.” Here there was no legitimate overriding purpose independent of invidious racial discrimination. Although the Court made no reference to Justice Edmond’s freedom of religion argument in Perez, it did state that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men” and that such freedom was “fundamental to our very existence and survival.”

The narrow holding of Loving is that miscegenation statutes are unconstitutional per se. Its implication is that any specific regulation of marriage pursuant to state police power must be shown to be necessary to the accomplishment of some permissible objective and that rational or reasonable means must be employed for the achievement of such permissible objective. In arriving at a judicial determination of issues as to alleged arbitrary classification or a claimed deprivation of individual liberty, both history and the consequences of decision are influential in the resolution of the problem. Except where there is impermissible classification on the basis of race, the problem essentially is one of weighing and balancing conflicting claims and making a reasonable and workable adjustment between individual, social, and public interests, all of which must be both recognized and delimited in some degree.

The several opinions in Griswold merely reinforce the proposition that a purported exercise of state police power in the name of public morality is subject to constitutional limitations. Since the civil right to marry already has been included within the concept of liberty and denominated as a basic fundamental right, it clearly comes within the “penumbras”

27. Id. at 11.
28. Id. at 12.
of the Bill of Rights. However, Mr. Justice Goldberg's thesis that there is a constitutionally protected right of privacy emanating from the Ninth Amendment increases the significance of the right to marry and perhaps broadens the scope of the right while narrowing the area for permissible regulation. He asserted the proposition that states are not free to experiment with fundamental personal rights, and said such rights "may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose," and that a regulatory measure could be justified only "upon showing a subordinating interest which is compelling," and proof that the law was necessary rather than merely rationally related to the accomplishment of a permissible state policy. To him, it was important to ascertain whether or not the state purpose could "be served by a more discrimately tailored statute, which does not . . . sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples."

It would thus appear that with the exception of the dissenting opinions of Mr. Justice Black and Mr. Justice Stewart in *Griswold*, there is general agreement that the right to marry is a fundamental individual interest that is constitutionally protected. The opinion in *Griswold* by Mr. Justice Douglas, and the unanimous decision in *Loving*, approach the weighing and balancing of competing interests function in terms of proper state purpose and rational means for its achievement. Mr. Justice Goldberg, on the other hand, insists that the particular state control of the right to marry must be "necessary" and "compelling" and that it is not sufficient that the state policy is a permissible and rational means to effectuate that policy. Obviously, it may make a difference in the determination of the constitutionality of specific regulations which of the two approaches is adopted. The approach adopted by Mr. Justice Goldberg is in accord with the "preferred freedoms" approach of earlier cases and similar to Justice Edmond's decision in *Perez* where he asserted that only a "clear and present danger" could justify a miscegenation statute.

Several common examples of state regulation of marriage will be considered in order to determine whether or not they are subject to constitutional challenge. Particular measures will be evaluated both in terms of the end and means approach and in terms of Mr. Justice Goldberg's insistence that the abridgements of fundamental individual liberties must

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31. Id.
32. Id. at 498.
be "necessary" and that it is not sufficient that there be a legitimate concern.

**III. CONSTITUTIONALITY OF SPECIFIC REGULATIONS**

Statutory regulation of marriage takes many forms and there are significant differences between statutes seeking comparable objectives. Of immediate concern, are statutory regulations as to who may marry, licensing requirements, essential formalities, and waiting periods before marriage, rather than the usual grounds for annulment or divorce. Moreover, there may be constitutional and practical differences between similar statutes which have been held to be mandatory in some states but merely directory in other jurisdictions, and similarly, there may be differences as to who may raise constitutional issues and as to when and how that may be done. In the discussion that follows, it is assumed that none of the problems presented entails as clear-cut an issue as that involved in the miscegenation case and that there is at least a colorable state interest that may be claimed for the particular regulation. It may be that only a particular application of the statute in question, rather than the statute as such, raises an issue as to an unconstitutional abridgment of the right to marry.

**A. Prohibition of Common Law Marriages**

Since the Decree of Tametsi of the Council of Trent in 1563 and Lord Hardwicke's Act of 1753, substantial restrictions have been placed on informal and private contracts of marriage.\(^{34}\) In England, canon law after the twelfth century required marriage in the church,\(^{35}\) but informality did not impair the validity of irregular marriages.\(^{36}\) Apparently the sanction of penance imposed by ecclesiastical authorities did not deter private marriage contracts, and the common law requirement that vows be exchanged at the church door in order for dower interests to arise was a more strict regulation than that imposed by canon law.\(^{37}\)

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34. After the Council of Trent the canon law of the Continent required that marriage occur in the presence of a priest, and after Lord Hardwicke's Act, it was required that English marriages occur in the parish church of the Anglican church even though the parties were dissenters. Quakers and Jews, however, but not Roman Catholics, were excepted. In 1836, the requirement that members of other sects marry in the Anglican church was removed because it had been estimated that one-third of all English marriages since 1753 had been irregular and at least in theory void. See Report of the Royal Commission on Ecclesiastical Courts (1832).

35. For an interesting and succinct discussion of canon and civil law regarding marriage in medieval England, see C. Powell, English Domestic Relations (1917).

36. See F. Pollock & F. Maitland, 2 History of English Law 369 et seq. (2d ed. 1923).

37. Id. at 374 et seq.
In the United States, after an initial disagreement as to whether or not so-called common law marriages were valid, the prevailing view came to be that parties who otherwise had capacity to marry were free to marry by private contract. Moreover, when state legislatures began to impose license and ceremonial requirements for valid marriages, such statutes were strictly construed. Today, however, common law marriages are in general disfavor and even where not abolished may be subject to such stringent requirements of proof that in practical effect they are abolished by judicial fiat. At the present time there are fifteen American jurisdictions which permit common law marriages but the trend is to require not only an exchange of marriage vows in the present tense but also open cohabitation and reputation as man and wife. Such a public relationship, where marriage is intended, is to be distinguished from an informal liaison that courts characterize as "meretricious" and parties often call "common law."

Although the states differ as to whether or not a license is mandatory and whether its absence makes a purported marriage void, lack of authority of an officiant usually does not impair the validity of the marriage if one or both parties in good faith believed there was such authority. This is the so-called "Mock Priest" rule. It also should be noted that in most states the regularity of a purported marriage is presumed. Where parties ostensibly are man and wife, their legal status as such is presumed; where there are successive marriages, the validity of the latter is presumed, often by strained interpretations of facts or ingenious speculation. In effect, in most states, there has been a legislative outlawing of common law marriages but a legal marriage may be presumed and licensing and ceremony requirements may be held to be directory rather than mandatory. The distinction in this area is that between a void and valid marriage. There

40. See Grigsby v. Reib, 105 Tex. 597, 153 S.W. 1124 (1913), requiring that in addition to private contract there be cohabitation and reputation as man and wife.
41. The 14 jurisdictions still permitting common law marriages in addition to the District of Columbia, include the following: Alabama, Colorado, Florida, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas. See H. Clark, Law of Domestic Relations § 2.4 (1968), for an excellent summary of the current situation as to common law marriages.
42. See Foster, Common Law Divorce, 46 Minn. L. Rev. 43, 44-48 (1961).
45. See H. Clark, supra note 41, at § 2.3.
is no concept of a voidable marriage that is subject to disaffirmance or annulment. It also is noteworthy that with rare exceptions, a common law marriage valid at the place of celebration will be recognized elsewhere.\(^{46}\)

There are several situations where the law pertaining to common law marriage may be applied so as to raise constitutional problems. First of all, the long tradition of imposing licensing and ceremonial requirements probably insures the constitutionality of a typical statute imposing such restrictions. Due to the prevalence of family and welfare legislation, and the concern over vital statistics, there is a demonstrable public interest to be served by requiring the procurement of a license and registration of the marriage. It is of interest, however, that non-compliance usually may be waived.\(^{47}\)

With regard to mandatory requirements of a ceremony a different issue is posed. Suppose, for example, the parties procure a license to marry and are willing to register the fact of marriage but are unwilling to have a ceremony performed by a clergyman or public official. The public interest in vital statistics is adequately served by the license and the registration. The parties might argue that to compel them to engage in a ceremony before a clergyman or judge and to deny the efficacy of a private ceremony is an invasion of privacy. A few states, such as New York, have recognized such private interests as this by specific authorization of private contracts of marriage if they are duly registered.\(^{48}\) Some other states have statutory exceptions for members of religious faiths who marry within the congregation but without an officiant.\(^{49}\) Under Mr. Justice Goldberg's approach, it may be that ceremonial requirements are not necessary nor compelling. Moreover, if ceremonial requirements are viewed as religious in character, the claim may be made that they constitute an establishment of religion.

The latter argument certainly could have been made with reference to the former law of Maryland which required a religious ceremony.\(^{50}\) However, where there may be a choice between a religious or civil ceremony,

\(^{46}\) Id. at 56-58. The leading New York case recognizing the validity of a foreign common law marriage is Shea v. Shea, 294 N.Y. 909, 63 N.E.2d 113 (1945). The leading case contra, is In re Veta's Estate, 110 Utah 187, 170 P.2d 183 (1946), construing the Utah statute.


\(^{48}\) N.Y. Dom. Rel. Law § 11(4) provides that a written contract of marriage may be executed by the parties and subscribed to by two witnesses and acknowledged and recorded in the same manner as a deed.

\(^{49}\) N.Y. Dom. Rel. Law § 12 recognizes as valid the customs "among the people called friends or quakers."

\(^{50}\) See Md. Ann. Code art. 62, § 4 (1957), which required marriages to be performed only by ministers or officials of religious bodies. The Maryland law was repealed in 1963. See Fehley v. Fehley, 129 Md. 565, 99 A. 663 (1916).
the establishment of religion argument loses force, although there remains the possibility of invasion of privacy. The privacy invaded, however, is an occasion which customarily has been public. There is no intrusion into marital relations as in *Griswold*. Our mores are such that the wedding is not private, although the honeymoon is or should be, unless the curious custom of *beilager* survives in some isolated locale. Moreover, many European countries insist upon a civil ceremony for a legal marriage and there is the possibility that a public as distinguished from a private ceremony may bring to light any impediments to a particular marriage. Probably the claimed invasion is so insignificant and slight and the privacy so ephemeral that ceremonial prerequisites will pass muster even under Mr. Justice Goldberg's approach.

A more substantial invasion of individual interests occurs where a state that has abolished common law marriages refuses to recognize the validity of a common law marriage that was valid where entered into. On one level, the problem is merely one of choice of law, and probably an esoteric or wrong choice is not unconstitutional. If, however, the problem is viewed as one involving a fundamental civil right, a constitutional issue is presented. Where, as in Utah, there is legislation outlawing out-of-state common law marriages by domiciliaries, it may be argued that it is constitutional for a state to try to prevent evasions of its law by Gretna Green elopements, but where there is no claimed jurisdiction over domiciliaries and the state where the issue arises had no legitimate concern with the status of the parties at the time of the marriage, refusal to recog-


53. H. Clark, supra note 41, at 56-57, classifies three different groups of cases as to the recognition of foreign common law marriages. The first group, characterized by New York, extends ready recognition to such marriages if valid where entered into. A second group, characterized by Utah, refuses to recognize such marriages where entered into by Utah domiciliaries in an effort to evade Utah law. The third group, characterized by Kentucky, recognizes foreign common law marriages only if the parties had an established place of abode in the state of ceremony and were not there merely on a sojourn or for a visit. Compare *Shea v. Shea*, 294 N.Y. 909, 63 N.E.2d 113 (1945), with *In re Veta's Estate*, 110 Utah 187, 170 P.2d 183 (1946), and *Kennedy v. Damron*, 268 S.W.2d 22 (Ky. 1954).


nize the marriage may violate due process. Moreover, granted that a state may have a legitimate concern in closing the doors to evasions of its matrimonial laws by elopement, it may be argued as in Griswold that the prohibition "sweep[s] unnecessarily broadly" and thereby invades the area of protected freedoms. The deterrence of elopements may be achieved by less severe sanctions and the postulated state interest in forcing people to marry at home may be more theoretical than real as compared with the civil right to marry. Such is the usual rule unless the the evasion violates a strong public policy such as that against bigamy or incest which obviously are properly regarded as attempted evasions of greater magnitude.

B. Prohibition of Incestuous Marriages

It is safe to conclude that purported marriages between ancestors and descendants, or between siblings, may be prohibited by civil law and punished by criminal sanction. The incest tabu is a universal cultural phenomenon and prohibited degrees of consanguinity have been a traditional concern of both canon and civil law. The freedom to marry and choose a mate does not extend to Oedipus or Electra, and the prerogatives of the Ptolemies are not common to mankind. The interest in public morality and perhaps that in genetics and inheritance and domestic tranquillity, support the prohibition against marriage between close relatives.

But how about attempted marriages between first or second cousins, uncle and niece, aunt and nephew, or those related by affinity?


58. Twenty-six states forbid marriages between first cousins or closer relatives. For a citation of statutes, see Moore, Defenses Available in Annullment Actions, 7 J. Family L. 239, 270 (1967).


60. Only Rhode Island permits the marriage of an uncle and niece where such is allowed by the Jewish religion. R.I. Gen. Laws § 15-1-4 (1956).

61. No state except Rhode Island authorizes the marriage of aunt and nephew. See Storke, The Incestuous Marriage—Relic of the Past, 36 U. Colo. L. Rev. 473 (1964). Id. at 485, reports that foreign first-cousin marriages were recognized as valid in eight out of thirteen instances, while only four of eighteen uncle-niece and aunt-nephew marriages were recognized as valid. See generally Annot., 117 A.L.R. 186 (1938). Incuria v. Incuria, 155 Misc. 755, 280 N.Y.S. 716 (Dom. Rel. Ct. 1935), held an aunt-nephew marriage void in New York although valid where contracted.

62. Twenty-one states have and twenty-nine states do not have an affinity bar, and the recent trend has been to eliminate the prohibition. For a listing of state affinity statutes, see Drinan, The Loving Decision and the Freedom to Marry, 29 Ohio St. L.J. 358, 381 (1968).
sometimes said that unlike marriages between closer relatives these prohibitions merely violate positive as distinguished from natural law. In New York, although a New York marriage between uncle and niece is void, such a marriage may be sustained if authorized and celebrated in a jurisdiction having no such prohibition. In the case of first cousins, authorities are divided as to whether such marriages will be recognized if performed in a jurisdiction permitting the same. And in the case of affinity, some American decisions have adopted the historically anomalous position that the affinity bar ceases upon the death of the blood relative. Thus, it has been held that a step-son may marry a step-mother after the father dies.

There is no scientific justification, in genetics or otherwise, for barring all marriages between all cousins, between uncles and nieces, or between those related by affinity. In an age when there were extended families, rather than the typical nuclear family of today, there may have been a sociological justification for prohibiting such marriages, but such no longer is the case. The prohibition of such marriages may be supported if at all only by deferring to religious dogma and tradition. Moreover, in the case of uncle and niece, proscription comes from Catholic dogma that extends beyond the Biblical authority of Leviticus that determined the rule for Judaism.

As opposed to the individual right to choose a mate and marry, the state's concern seems minimal and in a sense a prohibition entails the establishment of religious doctrine not accepted by all faiths. Abraham Lincoln was the product of a marriage between cousins and Charles Darwin was involved in such a marriage. Certainly Oklahoma's prohibition against second cousin marriages cannot be supported by logic or experience and could not withstand evaluation in terms of Loving or Griswold. It is submitted that marriages between first cousins or between uncle and niece are in the same category. Aunt and nephew marriages stand on a slightly different footing because they are included within the prohibited degrees specified by Leviticus. Nonetheless, here too there is no scientific or cultural justification or useful purpose to be served by the interdiction. Hence, this prohibited degree may not withstand constitutional challenge.

63. In re Estate of May, 305 N.Y. 486, 114 N.E.2d 4 (1953). However, the purported marriage between uncle and niece will not be recognized as valid if it was not valid at the place of ceremony. Audley v. Audley, 196 App. Div. 103, 187 N.Y.S. 652 (lst Dep't 1921); Smith v. Smith, 179 Misc. 19, 37 N.Y.S.2d 137 (Dom. Rel. Ct. 1942).
65. See Annot., 1916C L.R.A. 723.
67. See Moore, supra note 64.
Affinity as a bar to marriage is difficult to comprehend except in metaphysical or mystical terms. Since *Brook v. Brook*,9 England has removed the barriers to a marriage between "in-laws" and in this country the trend is towards removal of the affinity bar. Since only religious dogma now supports the affinity prohibition, and no scientific or social justification may be claimed for it, there is a valid argument that such laws are unconstitutional. The only rational argument which may be made to support the affinity bar is that it is justified as a deterrent to familial romances. Of course, realistically, such a hypothetical deterrent is either inefficacious or superfluous, that is, love will triumph over all. Probably, current mores support incest statutes covering members of a nuclear family but not more distant relatives or in-laws even though the latter come within technical incest statutes.70 In passing, it may be noted that it is surprising that there is so little law on the validity of marriages between persons related by adoption since public policy would seem to favor a prohibition.71

C. Prohibitions For Reasons of Health

In the California miscegenation case, Justice Traynor asserted that a marriage regulation justified on public health grounds must be based on tests of the individual and not on arbitrary classification.72 The most common kinds of regulatory statutes predicated on public health assumptions that restrict the right to marry are those which require serological tests before a marriage license may issue. Such statutes may be drawn so as to forbid issuance of a license if one of the parties has a venereal disease, or the purpose may be merely to inform the parties of the danger.73 Clearly, even in this day of penicillin, either type of statute is a reasonable exercise of public health power. Barring the marriage also may be justified because of the danger to offspring, although again, realism indicates that withholding the license does not necessarily avert such danger.

There have been attacks, however, upon the wisdom of requiring serological examinations, due to the expense and inconvenience they entail.74 It has been suggested that the cost and the laboratory time could be put to

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69. 11 Eng. Rep. 703 (H.L. 1861). The refusal to recognize as valid a Danish marriage to a sister-in-law following the first wife's death, in effect was reversed by the Deceased Wife's Sister's Marriage Act of 1907, 7 Edw. 7, c. 47, § 1 which authorized such marriages and eliminated the affinity bar. See also the Deceased Brother's Widow's Marriage Act, 1921, 11 & 12 Geo. 5, c. 24, which permits marriage between a man and his deceased brother's widow.

70. See H. Clark, supra note 41, at § 2.8.


73. See H. Clark, supra note 41, at § 2.10.

74. See Monahan, State Legislation and Control of Marriage, 2 J. Family L. 30, 33-35 (1962), and the medical authorities there cited.
more effective use in the campaign against venereal disease. With the recent increase in the problem of venereal disease, such arguments lose force, and in any event, whatever constitutional test is applied, the problem appears to be one for legislative discretion.

There are other kinds of health regulations which raise more difficult constitutional problems. A few states have enacted statutes which permit the imposition of physical examinations upon marriage applicants. In some states persons having tuberculosis or epilepsy may be denied marriage licenses. All such statutes would seem to be in the doubtful category as being too broad and sweeping except where applied in an individual case to a person in a communicable state or egregiously unfit for marriage. Neither medical nor moral justification exists to support the withholding of a marriage license from a physical wreck, a TB patient who is not in a communicable state, or an epileptic who, with medication, keeps his affliction under control. Even the alcoholic or drug addict should and probably does have a civil right to marriage, although fraudulent concealment of the disease may reasonably be made a ground for annulment and post-nuptial addiction may be a reasonable ground for divorce.

Insanity presents a crazy quilt pattern of regulation in the marriage area. Historically, the annulment and divorce picture has been schizophrenic in its treatment of mental competence. On the one hand, in annul-

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75. See Note, 53 Harv. L. Rev. 309 (1939), where it is stated that early statutes commonly required personal affidavits of good health from applicants for marriage licenses, and that between 1913-1928, Alabama, Louisiana, North Dakota, Wisconsin, and Wyoming, enacted statutes requiring medical examinations.


77. See Note, The Legal Problems of Epilepsy, 29 Temple L.Q. 364 (1956), which reports that at one time twenty states held that epileptics were disqualified from marrying. See also R. Barrow & H. Fabing, Epilepsy and the Law, ch. 1 (1956); Comment, Eugenics in the Modern State: The Saltiel Law, 32 Ill. L. Rev. 327 (1937).


79. Drinan, supra note 62, at 372-73 reports that California, Illinois, New Jersey, and Ohio direct the clerk to refuse a license to anyone who is under the influence of a "narcotic drug" and that six states have legislated against granting a marriage license to a person under the influence of mind-expanding drugs. Ore. Rev. Stat. § 106.071 (1967) requires the applicant to produce from a physician a statement that he or she "is free from . . . drug addiction or chronic alcoholism," and Del. Code Ann. tit. 13, §§ 101(b)(4)(5) makes subject to annulment any marriage entered into by a "confirmed user of a narcotic drug" or an "habitual drunkard." At least forty states make habitual drunkenness a ground for divorce and or judicial separation, and nineteen permit divorce or judicial separation for the habitual use of drugs. See chart, Divorce, Annulment and Separation, prepared by National Legal Aid Association (1965).
ment cases the capacity sufficient for consent is minimal, usually much less than that which would subject the person in question to guardianship for his financial protection. Moreover, in such cases, where the marriage is deemed merely voidable, there is disagreement as to who has standing to bring the annulment action. On the other hand, statutes frequently authorize the denial of marriage applications to persons described as "lunatics," "insane," "idiots," "imbeciles," "feeble minded," "mentally retarded," or "morons." A few statutes refer to prior institutionalization in a mental hospital.

Kansas formerly had a statute which provided that "[n]o woman under age of forty-five (45) years, or man of any age, except he marry a woman over the age of forty-five (45) years, either of whom is feeble-minded or has been adjudicated insane, shall hereafter intermarry or marry any other person within this state as long as the mental deficiency exists or the person adjudicated insane has not been restored to their civil rights." In 1965, the Kansas statute was amended to eliminate "feeble minded" and to substitute the phrase "adjudged incapacitated person," but the substance of the statute was preserved.

Although the former Kansas statute was sustained in that state as a valid exercise of police power, several interesting questions are posed. From the constitutional point of view, both "feeble minded" and "adjudged incapacitated person" may be vague and uncertain terms. The statute and its successor probably could not be constitutionally applied where the questioned party was sterile or non-psychotic. The legislative choice of forty-five years is an interesting one for the "Bible belt," where presumably the story of Sarah was forgotten when the statute was drafted. Moreover, if the legislative policy rests upon genetic assumptions, rather than for the protection of the incapacitated person from imposition, legis-

82. See H. Clark, supra note 41, at § 2.15 (1968). Drinan, supra note 62, at 372, says that thirty-four states and Puerto Rico impose impediments to marriage based on insanity, feeblemindedness or related disabilities but that sixteen states have no statutes specifying physical or mental disqualifications for marriage.
83. See H. Clark, supra note 41, at § 2.15.
87. Compare the reasoning of Justice Traynor in Perez v. Sharp, 32 Cal. 2d 711, 198 P.2d 17, 28-29 (1948), in which he stresses the vagueness of definitions of race with the rule as to "vagueness" formulated in Winters v. New York, 333 U.S. 507 (1948). "Feeble minded" and "incapacitated" are equally vague terms.
lative notice was not had of the writings of a distinguished Kansan, Dr. Karl Menninger who has minimized the incidence of inherited mental disorders. If the Kansas statute is applied, however, to protect a person from exploitation, or where there is a serious and medically established danger of the transmission of mental disease, it is not likely that the legislative judgment would be termed "irrational." We should have some skepticism in this regard, however, due to the actual facts of *Buck v. Bell*, where instead of the assumed three generations of imbeciles, in fact the third generation was normal, and the first two generations were unrelated by blood.

From what has been said above it may be concluded that where legitimate public health reasons augment moral considerations, restrictions upon marriage are likely to be upheld. However, if there is no sound medical reason but only an assumption based upon obsolete notions, the statute itself rather than its arbitrary application creates a constitutional issue. To make an analogy to the recent case of *Ginsberg v. New York* which sustained prohibitions against the sale of "girlie" magazines to minors, there may be justification for a separate classification of the mentally and physically incompetent insofar as the right to marry is concerned. Unlike the *Ginsberg* case, however, the legislative judgment may be "irrational" in the light of existing medical knowledge. Moreover, although obscenity may not be protected free speech, marriage is recognized as a basic civil right of man. Thus, it may be anticipated that not only the statute but its application must be justified by sound medical, public health, or moral reasons.

D. Restrictions Upon Remarriage

One class of persons who frequently are subjected to a deprivation of the right to marry are parties to divorce. Such may occur due to a waiting or "cooling off" period before or after a divorce decree, or due to a penalty imposed upon the guilty party, as in the case of so-called "paramour acts." Some twenty-two states restrict the right of the parties to a divorce to remarry at pleasure, although usually they may remarry one another. In eighteen states the incapacity is for a specified period, in four states it is a matter for judicial discretion, and in six states there is judicial discretion within fixed statutory limits. In five states the inca-

90. 390 U.S. 629 (1968).
91. See H. Clark, supra note 41, at §§ 13.4 and 13.8; Moore, Defenses Available in Annulment Actions, 7 J. Family L. 239, 266-70 (1967), for a citation of authorities.
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Capacity is imposed only on the guilty party and in two of those states the incapacity relates only to the paramour. The legislative objective for a cooling off period before or after divorce is to encourage reconciliation and to discourage divorce; the purpose of paramour acts is to punish the offending spouse and to deprecate the eternal triangle. Interlocutory decrees or decrees nisi also perform the dual function of affording time for motion or appeal and providing a respite for the parties to think things over.

Interlocutory decrees vary in length from three months to a year and under some statutes the interlocutory decree becomes final automatically after the lapse of the designated time while other states require the entry of a final order by the court. Eighteen jurisdictions disallow marriages during the interlocutory period and in four states there is judicial discretion to regulate remarriage during the period. Local practice also differs as to whether a second marriage during the interlocutory period is void or whether a nunc pro tunc order may be entered so as to validate the intervening marriage. Usually it is held that if the divorce decree is not final a purported remarriage is a nullity except insofar as it may be saved by a nunc pro tunc order or insulated from collateral attack due to principles of estoppel.

Constitutionally, it probably is impossible to successfully challenge the ordinary decree nisi or procedural rules relating to when a divorce decree becomes effective. However, it should be noted that there is little if any evidence to support the presumed social good that a long “cooling off” period is supposed to achieve. A recent report concludes that the device occasions harm and accomplishes little, if any, social good. Although the assumed basis for “cooling off” statutes cannot be demonstrated,

92. Moore, supra note 91.
93. H. Clark, supra note 41, points out that the assumption that the eternal triangle lies back of most divorces is unwarranted, citing the study of Goode, After Divorce, Chs. X, XI (1956).
94. H. Clark, supra note 41, at § 13.8. New York Dom. Rel. Law § 242 formerly imposed an interlocutory period of three months before a divorce decree became final and held a purported marriage during that period was void. However, L. 1968, ch. 645, abolished the interlocutory period by repealing N.Y. Dom. Rel. Law §§ 241, 242. See Landsman v. Landsman, 302 N.Y. 45, 96 N.E.2d 81 (1950). California formerly had a one year period after the initial decree but recently amended its statute to make the one year period run from the date of the filing of the divorce petition. See also, Note, 56 Colum. L. Rev. 228 (1956), which reports that as of that date some thirteen states banned remarriage for a specified period after divorce and some sixteen states provided for interlocutory decrees.
95. Moore, supra note 91.
it is likely that such provisions will be sustained unless the legislature arbitrarily sets too long a period for the "cooling off" so as to impose a clearly unreasonable disability that frustrates the civil right to marry. Prior marriage failure, however, does not justify the imposition of a permanent or temporary incapacity since the great majority of divorced persons are not divorced again, although the incidence of divorce where both parties have a prior divorce is at least twice that for undivorced couples.

Paramour acts have a venerable history in this country and are a product of the preoccupation with fault grounds for divorce. Pennsylvania and at least two other states have comparable statutes forbidding an adulterous spouse from remarrying a partner in adultery during the lifetime of the innocent spouse who is awarded a divorce. In three other states, the divorce court has discretion to forbid remarriage by the guilty spouse; West Virginia courts have discretion to bar the guilty spouse from remarriage for a year. North Dakota requires that the court specify if the parties are free to remarry; and in Massachusetts, until 1965, any guilty defendant, whatever the ground, was prohibited from remarriage for two years if the plaintiff spouse was still alive. In New York, before the Divorce Reform Law, a defendant divorced for adultery could not remarry in New York during the lifetime of the plaintiff except with court permission upon the showing of good behavior for at least three years following the divorce. Virginia has a similar stat-


100. Monahan, How Stable are Remarriages, 58 Am. J. Sociology 280 (1952), on the basis of a limited sample asserts that where both parties have had a prior divorce, the divorce rate is at least double that of parties who have never been divorced, and that where both parties have had two or more prior divorces, the mortality rate of such marriages is over seventy percent.


102. See Ala. Code tit. 34 § 23 (1959); Ga. Code Ann. § 30-122 (Supp. 1967); and Miss. Code Ann. § 2744 (1957). See also Va. Code Ann. § 20-119 (1960), which provides that the court has discretion to order that a defendant guilty of adultery "shall not marry at any time." However, after six months, such a defendant may seek modification of such an order.


The repealed New York statute also prohibited the issuance of a New York marriage license to a person divorced for adultery in another jurisdiction unless three years had elapsed since the decree.

State courts in construing paramour acts have disagreed upon their extra-territorial application. New York consistently held its law to be penal and for local consumption only. Hence, if the guilty party remarried, the marriage would be recognized as valid in New York if valid at the place of ceremony. Difficulty arose, however, where the place of ceremony had the Uniform Marriage Evasion Act or an equivalent statute. Pennsylvania, on the other hand, has held that a purported remarriage in another state by a guilty defendant is void and that its statute has extra-territorial application. Such a holding is questionable even in the case of domiciliaries who leave Pennsylvania to evade the prohibition, and is constitutionally indefensible if applied to persons who have left Pennsylvania for good so that Pennsylvania no longer has a legitimate concern as to their marital status. Probably it would be a denial of due process for Pennsylvania to refuse to recognize the validity of a remarriage to a paramour where the state concerned with the status regarded the marriage as valid. For example, if Pennsylvania, after the death of a guilty husband, refused to recognize the second wife as widow for inheritance purposes, and the parties had entered into a valid marriage in some other state after cutting all ties with Pennsylvania, such probably would offend substantive due process, more clearly so in the case of personality, less so in the case of realty because of the traditional sovereignty over land within the state.

Even where a paramour act is imposed as a penalty to prevent the remarriage of an adulterous citizen who remains within the state and hence there is in general a legitimate concern over status, such an abridgement of the right to marry may be without justification and unconstitutional. Ordinarily the penalty is imposed without a jury trial, and as often as not in uncontested cases. In a sense the “scarlet letter” becomes a bill of

as to make it clear that either party to a divorce might remarry without court permission regardless of the date of the divorce.


111. See H. Clark, supra note 41, at 405-06 for a discussion of the holdings as to extra-territorial application of paramour acts. Upon analogy to jurisdiction to tax, it would seem that there should be no jurisdiction over marital status after domicile has been abandoned and all ties have been severed with the divorce forum.
attainder. When one pauses to consider what social good is accomplished by the penalty other than public condemnation of sin and soothing the hurt pride of the presumably virtuous but cuckolded spouse, justification is difficult to find. It comes close to irrationality to assume that paramour acts deter adultery. The practical consequence of such statutes is that either the illicit couple moves to another state or continues at pleasure the illicit relationship. The impediment to making the illicit licit accomplishes no demonstrable public good. It may well be that the Supreme Court would find paramour acts unconstitutional as not being necessary to the accomplishment of any permissible state objective, or as not employing rational or reasonable means to achieve an objective assumed to be permissible. Under Mr. Justice Goldberg's approach in Griswold, there is no "compelling" or "necessary" purpose to be served. In short, it is likely that such statutes are unconstitutional, at least if the incapacity is imposed indefinitely or for a substantial length of time.

If the constitutional validity of paramour acts and similar legislative expressions of moral indignation is doubtful, what of economically motivated restrictions against second marriages? The Wisconsin Family Court Act has a provision requiring court permission for a remarriage by a person formerly divorced and subjected to a child support order. Although the statutory language would seem to make the statute applicable to out-of-state marriages as well as Wisconsin marriages, it has been held that the statute has no extra-territorial application where the marriage takes place in another state to a citizen of another state even though the matrimonial domicile is Wisconsin. Certainly, serious constitutional objections would have been raised had extra-territorial application been given to the Wisconsin law.

In effect, the Wisconsin measure attempts to cope with the common problem of inability to support two families, and its purpose is to reduce the number of families on public assistance. The statute is implemented

112. It may not be too far fetched to argue that some statutory penalties visited upon guilty defendants in divorce cases approximate bills of "pains and penalties" or "bills of attainder" and that to automatically punish and deprive such a citizen of his basic right to marry is as serious a deprivation as those involved in United States v. Lovett, 328 U.S. 303 (1946); Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866); and Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866). Mr. Justice Black, concurring in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 143-44 (1951), asserted that "governmental blacklists possess almost every quality of bills of attainder." Certainly the right to marry equals in importance the right to pursue a calling. It should be noted, however, that paramour acts apply prospectively and are not ex post facto in operation and that Mr. Justice Frankfurter in American Communications Ass'n v. Douds, 339 U.S. 382, 419-21 (1951) (concurring opinion), distinguished between punishment for past actions and for future conduct. Compare Comment, 63 Yale L.J. 844 (1954), with Comment, 28 Rocky Mt. L. Rev. 250 (1955-56).
114. In re Ferguson's Estate, 25 Wis. 2d 75, 130 N.W.2d 300 (1964).
by requiring the appearance before the court of both the husband subject to a support order and the prospective second wife, and before a marriage license will be issued, the latter is informed of the priority of the husband’s commitment to his first family.\textsuperscript{115} Denial of the application is rare but suppose the court refuses to permit the issuance of a marriage license? Is the assumed financial interest of Wisconsin taxpayers such that it overrides the civil right of marriage? Or is the statute an example of class discrimination because in practice its pinch will be felt by the poor?\textsuperscript{116} Certainly Delaware’s prohibition of a marriage between paupers and Vermont’s requirement of consent by a selectman before a “town pauper” may marry are examples of discriminatory legislation.\textsuperscript{117} What of the means adopted, namely, the withholding of a marriage license; are the means too broad and sweeping? Perhaps, due to the state’s historical concern over the imposition of the support obligation and the regulation of marriage, the Wisconsin statute is not unconstitutional on its face but an arbitrary denial of a license would constitute an abridgement of the right to marry.

Another Wisconsin anomaly is the statutory vesting of absolute discretion in the trial court to grant either an absolute divorce or a legal separation on an action for either, regardless of the prayer for relief.\textsuperscript{118} Moreover, conscientious objection of one party is a sufficient basis for granting a separation decree instead of a requested divorce. In practice, “conscientious objection” means religious scruples against divorce.\textsuperscript{119} It would seem that these provisions are of doubtful constitutionality. To saddle a husband with a judicial separation when he has made out grounds for divorce, merely because the wife for religious reasons is opposed to divorce, certainly is unreasonable, if not irrational, from the husband’s point of view, and the classification itself may be a denial of equal protection or constitute an establishment of religion. California also has a quirk in its present law which permits a cross-complaint for divorce to a

\begin{itemize}
\item \textsuperscript{115} See 1964 Annual Report of the Family Court of Milwaukee, where it is reported that permission was granted to remarry in 219 such cases in 1964.
\item \textsuperscript{116} See tenBroek, California’s Dual System of Family Law, 16 Stan. L. Rev. 257, 900 (1964), 17 id. at 614 (1965).
\item \textsuperscript{118} Wis. Stat. Ann. § 247.09 (Supp. 1968) reads in part: “[a] divorce or legal separation may be adjudged regardless of such demand whenever the court finds that it would not be in the best interests of the parties or the children of the marriage to grant such demand and also states the reason therefore. Conscientious objection to divorce shall be deemed a sufficient reason for granting a judgement of legal separation if such objection is confirmed at the trial by the party making such demand.” See Chase v. Chase, 20 Wis. 2d 258, 122 N.W.2d 44 (1963); Hooker v. Hooker, 8 Wis. 2d 331, 99 N.W.2d 113 (1959).
\item \textsuperscript{119} Chase v. Chase, 20 Wis. 2d 258, 122 N.W.2d 44 (1963).
\end{itemize}
separation action and an evasion of the residence requirements, but it does not seem to raise any constitutional issues.\textsuperscript{120}

E. Restrictions Based upon Age

An age of consent for marriage is established in every American jurisdiction, the most common ages being sixteen for the female and eighteen for the male, provided there is parental consent.\textsuperscript{121} Parental consent most frequently is stipulated for marriages where a male is under twenty-one and a female under eighteen but such provisions usually have been held to be directory rather than mandatory.\textsuperscript{122} The recent decision of the Supreme Court in the \textit{Gault}\textsuperscript{123} case raises the problem of the constitutional right of minors to marry, either at an age below the specified age of consent, or without parental permission.

It is obvious that the right to notice and fair proceedings that was recognized in \textit{Gault} in a situation where the juvenile faced possible incarceration until he was twenty-one, is of a different order than a minor's claimed right to marry. Although it may no longer be appropriate to adopt \textit{parens patriae} premises and to ignore the practical consequences of the assumption of such prerogatives, nonetheless minors for some purposes are \textit{sui generis} and are subject to special protections and controls, whether or not we call them "wards" or "persons in need of supervision." It is rational, especially for their own protection, to assume immaturity of judgment and an absence of adult capacity. In other words, their protection or regulation is a proper subject matter of police power, and the constitutional issue most likely to be raised is the necessity of reasonableness of a particular regulation.\textsuperscript{124} However, if a state arbitrarily set the age for marriage without parental consent at age twenty-five or thirty, and made all purported marriages below that age void, there would be a direct conflict with the individual's right to marry.

\begin{footnotesize}
\begin{enumerate}
\item See Goodwine v. Superior Court, 63 Cal. 2d 481, 407 P.2d 1, 47 Cal. Rptr. 201 (1965).
\item Some thirty-two states specify eighteen years for the male and sixteen years for the female as the age of consent. Massachusetts and New Hampshire set the age of fourteen for the male and twelve and thirteen respectively for the female. Three states specify age fifteen for the male, nine states age sixteen and three states seventeen. Six states specify fourteen for the female, eight states fifteen, and New Jersey age eighteen.
\item Some thirty-one states purport to require parental consent if the male is under twenty-one or the female under eighteen, fourteen states either require parental consent for "minors" or if either is under twenty-one, and three states require parental consent only if either applicant is under eighteen. The requirement of parental consent usually is construed as directory rather than mandatory, except where, as in California, the statute specifically provides that a marriage without parental consent is invalid. See H. Clark, supra note 41, at 79.
\item In re \textit{Gault}, 387 U.S. 1 (1967).
\end{enumerate}
\end{footnotesize}
There is ample evidence to support the state's concern over teen-age elopements. The mortality rate on young marriages is inordinately high and existing law in most states has not effectively dealt with the problem. The failure to obtain parental consent usually does not affect the validity of a nonage marriage. Marriages below the age of consent, without court permission, are usually deemed "voidable" rather than "void," although it may be assumed that the common law might be applied to a purported marriage of a puling babe. There also is well reasoned authority for holding that teen-age elopements are void and it has been suggested that the nominal requirement of parental consent should be backed up by holding that its absence makes the purported marriage void, or subject to annulment by a parent.

It is ironic that there is greater laxity regarding the enforcement of legislative directives against infant marriages than is true with regard to other regulations of marriage. Judicial permissiveness, the sentimentality of the romance of Romeo and Juliet, and concern over the legitimacy of children, may account for the prevailing attitude. The social and human cost, however, is considerable, especially where divorce is difficult to obtain. Experts on the modern family by no means agree that teen-age marriage is the sensible solution even where the girl is pregnant. If family stability is the legitimate social objective and concern of the state, it is undermined by the prevailing law and custom as to underage marriage.

It seems fair to conclude that Gault imposes no obstacle to the reasonable regulation of teen-age marriages, that the subject matter is a permissible one for public regulation due to the state's concern over minors and

125. An article in the Long Island Press reports that the chances that young marriage will end in divorce are six times greater than for couples over twenty. Long Island Sunday Press, May 7, 1967, at 36, col. 1. A recent study in Ohio reported that of 20,000 Ohio divorces, seventy percent involved teen-age girls and over one-third were elopements.
126. Moore, Defenses Available in Annulment Actions, 7 J. Family L. 239, 245 (1967), reports that the statutes of eight jurisdictions declare void nonage marriages while those of fifteen jurisdictions characterize such marriages as voidable. The absence of parental consent, however, except in California, does not affect the validity of the marriage. H. Clark, supra note 41, at 79.
127. In the later period of the common law, marriages below age seven were void, those of a girl between seven and twelve or a boy between seven and fourteen became valid if ratified upon reaching the respective age, and marriages after such ages were valid. However, there are many accounts of marriages at earlier ages. "Grace Salesby (1194-1259) was married 3 times and twice a widow at the age of 10 years. She became a bride for the first time when she was only 5 . . ." "Believe it or not," N.Y. Journal-American, January 18, 1959, at 1.
the stability of marriage, but that the means employed or sanction imposed will be subject to due process and equal protection criteria. Moreover, under unusual circumstances, a statute such as New York's, which permits parents to seek the annulment, might be applied in an unconstitutional manner, as for example where an annulment is arbitrarily granted over the reasonable opposition of the young husband and wife who have shown themselves capable of adjusting to the marital relationship and are mature enough to undertake its responsibilities.

F. Miscellaneous Restrictions upon Marriage or Divorce

In England, an attempt has been made to discourage impetuous marriage and precipitous divorce by requiring court permission, regardless of grounds, where the divorce action is brought within three years of the date of marriage. In practice, permission usually is granted, but there is discretion to delay the divorce. It has been argued that delay in access to the divorce forum promotes family stability and that time will heal some if not all wounds.

In the United States, “cooling off” periods before, as distinguished from after, divorce have run into constitutional obstacles. Illinois held unconstitutional such a statute on the tenuous basis that it deprived litigants of speedy access to the courts as guaranteed by the Illinois constitution. However, a procedural change overcame that objection and was upheld. New York’s new divorce procedure, modeled on the Wisconsin law, permits a delay, for conciliation purposes, of up to 120 days before a divorce case may come to issue. Is such procedure constitutional? Since New York’s constitution does not have an equivalent to the Illinois provision, the issue would be one of an alleged denial of due process or equal protection because of delayed access to the courts for the remedy of divorce. Delay for counseling or conciliation efforts, if such services are provided, does not appear to be an unreasonable restraint upon an alleged right to divorce, although if instead of 120 days the period were made three years, or even a year, such a provision might become unreasonable, and if parties were forced to undergo extensive marriage counseling, the delay, expense

131. N.Y. Dom. Rel. Law § 140.
132. See Foley v. Foley, 122 Misc. 663, 203 N.Y.S. 674 (Sup. Ct. 1924), for a discussion of criteria considered by the court in the exercise of discretion in nonage cases.
133. See Matrimonial Causes Act, 14 Geo. 6, c. 25, § 2(1), at 388 (1950).
and possible invasion of privacy, might together constitute an arbitrary abridgement of a claimed right to divorce.

Probably the state’s concern over family stability will support ordinary counseling or conciliation requirements. However, the new provision in the New York law that the supervising justice may issue an order “requiring the parties, for a period not to exceed sixty days, to attempt to effect a reconciliation”138 may well constitute an invasion of privacy under the penumbra doctrine of the *Griswold* case. To date such discretionary power has not been used in New York but if a couple were ordered to make attempts to effect a reconciliation, and, for example to resume cohabitation, invasion of privacy would be clear. There is no American precedent for restoration of conjugal rights and the state’s interest in family solidarity does not warrant such an authoritarian measure. In fact, a good social and a convincing legal argument may be made against any scheme of compulsory counseling, at least if compulsion extends beyond mere appearance before a commissioner for a screening conference to determine whether counseling or conciliation is desired.139

A more familiar type of restriction upon the claimed right to divorce is the imposition of residency requirements for a designated period of time before a divorce petition may be filed. Depending upon variables, in New York the length of time required may be less than a year, a year, or two years.140 If the grounds arose in New York and both parties are New York residents at the time the divorce action is commenced, no specified period of residency is required. If the grounds arose elsewhere, or both parties are not New York residents at time of suit, a one or two year period of residency is specified. Although it may be difficult to demonstrate social or practical justification for such classification, probably the state interest in guarding against forum shopping and the use of its courts for migratory divorce will sustain such distinctions and a reasonable prior residency requirement before filing for divorce. From the standpoint of the aggrieved individual, however, there is a suspension, if not an abridgement, of his claim to divorce and, in a mobile society, he should not be penalized for an exercise of his right to move between states. If newcomers to a state may not be penalized insofar as the right to public assistance is concerned,141 the argument may be made that an unreasonable residency period before divorce is unconstitutional, although, in an analogous situation, New York has held that post-divorce alimony was not available.

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under its statutes, and that where neither party was domiciled in New York at the time of a foreign divorce a collateral attack will not be permitted upon the validity of the divorce.

Although the constitutionality of divorce grounds is not of immediate concern to the present analysis, brief mention will be made of some potential constitutional issues. The ground of adultery, as such, exists in every American jurisdiction and is an established and culturally accepted ground for terminating marriage. However, the various collateral penalties visited upon an adulterous spouse may be of doubtful constitutionality. For example, to deprive a parent, because of adultery, of all rights to custody or visitation, or to dispense with notice and consent for adoption, may violate due process principles. Cruelty and desertion likewise are ubiquitous as grounds for divorce and pose no special constitutional problems. "Enoch Arden" statutes, moreover, probably are valid, although a statute such as Pennsylvania's which gives the option to "Enoch" to reclaim his remarried wife or to let her remain married to her second husband, may be doubtful.

The uncertain operation of civil death in New York likewise raises constitutional problems. Life imprisonment, in or out of New York, under existing law gives the free spouse the option of regarding herself as divorced or still married. No court proceeding is required and the option may be exercised informally. There is no right to notice or hearing and a verbal repudiation of the marriage has been held to be effective. The New York law in this connection arose before imprisonment became a ground for divorce and judicial separation and constituted an escape hatch to supplement the former adultery only ground for divorce. Such a consequence of civil death no longer has utility and it may be anticipated that on constitutional or pragmatic grounds this esoteric unilateral option to repudiate will be abrogated. Both substantive and procedural due process are offended by the anachronistic case precedents.

There also is a rational basis for attacking those grounds of divorce which treat disease or illness as a matrimonial sin. Habitual drunkenness

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144. See Morrissey v. Morrissey, 182 Neb. 268, 154 N.W.2d 66 (1967); Wolpa v. Wolpa, 182 Neb. 178, 153 N.W.2d 746 (1967); Covault v. Covault, 182 Neb. 119, 153 N.W.2d 292 (1967), holding that as a matter of law an adulterous parent was disqualified from custody.
145. See N.Y. Dom. Rel. Law § 111.
and drug addiction may be symptomatic of illness and may be inap-
propriate to a fault oriented system of divorce. Insofar as such addiction
destroys a meaningful marital relation, however, regardless of scienter or its absence, if we accept contemporary values, it is desirable to put an end to the marriage.

This brings up the question of the so-called "irretrievable breakdown" theory of divorce which has gained current support in the California report and in the English study entitled "Putting Asunder." On the one hand it may be argued that to subject a nonconsenting party to divorce on a non-fault ground deprives such party of a marriage without due process of law; on the other hand it may be claimed that to perpetuate the bonds of acrimony of a dead marriage deprives the enchained spouse of personal freedom and the right to choose remarriage. To date, non-fault grounds, such as separation, have been sustained. The premise is that society has a legitimate concern to issue death certificates in the form of a divorce decree for dead marriages and that public morality will be thereby promoted. The premise has considerable sociological support, is buttressed by history, and certainly is not irrational. Therefore, non-fault grounds are constitutional, at least as long as economic rights and interests are respected.

Perhaps we have not as yet reached the point where a forceable argument may be made that a party has a constitutional right to terminate a meaningless marriage. However, we may be approaching the time when such an argument may be persuasive. The history of state control over marriage and divorce indicates that we are headed in that direction. It is difficult to justify the traditional impediments to divorce except on religious grounds which may be offset by claiming that they effect an establishment of religion. Moreover, the classic defenses such as recrimination,
condonation, connivance, and the like, are devoid of current utility. Social and moral justification for the ramifications of the "innocent and injured spouse" premise may be presumed but impossible to establish. Mr. Justice Black's notion that there is a civil right to divorce eventually may be recognized if attention is focused upon the realities of human relationships.

The most appealing argument against non-fault divorce may be made with reference to the economic hardship divorce may occasion. Dower, or its statutory equivalent, may be terminated by divorce. A presumably unoffending wife thus may lose her claim to a share of her husband's estate. In New York, where a judicial separation obtained by the innocent wife may be converted after two years into a divorce at the request of the guilty husband, various groups have asserted that the conversion ground is inequitable and unfair. It may be that amendments should be passed to protect the economic interests of the wife in this situation, but due to the Supreme Court's decision in the Simons case, it does not appear that due process principles require such an amendment.

Due to changing social values, judicial separation or limited divorce, where it is imposed upon an unwilling husband, also present potential constitutional issues. Since the husband is saddled with the detriments but deprived of the advantages of marriage, there is no reciprocal basis for the support obligation. Moreover, it has been authoritatively pointed out that the status of judicial separation is conducive to immorality. Nonetheless, the historical and religious antecedents of divorce a mensa et thoro are such that its elimination probably depends upon legislative rather than judicial action. Its legislative elimination recently was recommended in California and only religious doctrine seems to support such an unnatural status.

A critical evaluation in economic and social terms might threaten the assumptions underlying much of the law of alimony and support. The

158. See Foster and Freed, Comparison and Critique of Proposed Amendments to Divorce Reform Law, 157 N.Y.L.J. 4 (1967).
160. See 2 J. Kent, Commentaries on American Law, 127-28 (Lacy ed. 1889), where he refers to judicial separation as "throwing the parties back upon society in the undefined and dangerous characters of a wife without a husband and a husband without a wife." (citation omitted). 1 J. Bishop, New Commentaries on Marriage, Divorce, and Separation § 68, at 28 (1891), quotes Judge Swift as saying that bed and board divorce places the parties in "an irresistible temptation to the commission of adultery." (citation omitted).
support obligation of the husband initially was imposed at a time when he gained ownership or control of his wife's property and before women became a large proportion of the working force. Current law does not adequately reflect contemporary economic and social facts. In most states, the wife but not the husband has a potential claim to support or alimony. Professor tenBroek has pointed out that there is a dual system of support and alimony law. Both equal protection and due process arguments may be made against existing law and its application. Uneven matrimonial property law, the refusal of some states to recognize property rights in the wife upon annulment, and various other irrational, unjust, or discriminatory, statutes and principles, permeate much of the law of marriage and divorce. For the most part, however, allegations of such economic discrimination or injustice must be addressed to the legislative branch and due to historical precedent are not apt to appeal to a judiciary inured to customary but inapposite regimes and rules inherited from feudal times.

IV. CONCLUSION

It is obvious that in the application of principles derived from Griswold and Loving to a few examples of potential due process, equal protection, or invasion of privacy problems, new wine has been poured into old bottles. We have stretched the principles and have strained to create issues although prudence indicates that we may have made a "federal case" out of matters which may be left for local or state autonomy. There is a strong prejudice for state rather than federal control over a subject traditionally left to the smaller community. Moreover, the judiciary has an understandable bias to leave substantive marriage and divorce reform up to the legislative branch. Nonetheless, some of the more egregious examples cited above are subject to serious constitutional challenge.

It is reasonable to conclude that states are free to regulate the licensing and ceremonial requirements for marriage and to abolish common law marriages. States also have ample authority to prohibit marriage within the traditional incestuous degrees of relationship. The affinity bar, or the consanguinity bar as applied to more remote relatives, have no acceptable basis except tradition. Prohibitions against marriage based upon reasonable public health grounds also are supported by legitimate public concern. Penal regulations, however, although long taken for granted, are difficult to justify. In all of these cases, an application of a general statute to an

163. Nineteen states by statute permit alimony in some cases to be awarded to the husband upon divorce. See Comment, Alimony for Men, 3 U. Kan. L. Rev. 357 (1955).
164. tenBroek, supra note 116.
166. Drinan, supra note 62, at 365 argues that criminal statutes concerning seduction,
individual party may unduly restrict the civil right to marry, or the regulation may be too broad and sweeping.

A modern Marriage Code is urgently needed in order to eliminate laws and regulations which are no longer in accord with social values. One distinguished authority has argued that a marriage registration statute and not a license law "would be appropriate and desirable" and that the law as to annulment should make marriages either valid or void and should eliminate the category of "voidable." The Commissioners on Uniform State Laws presently are engaged in the study and preparation of such a code and a companion code on divorce. The hope for a reasonable and rational law of marriage and divorce ultimately depends upon legislative response to demands for reform. The most that courts can do is to work intersitionally and to point out general criteria. However, the constitutional principles set forth by the Supreme Court in Griswold and Loving provide a perspective and emphasis which is bound to influence judicial decision and legislative reform.

If in reality marriage is a basic civil right of man, its deprivation too long has been suffered and tolerated. But it should be noted that if there is an individual right to marry there also is a family interest in the marriage status, and a legitimate public concern as to the stability of the family. In the final analysis, there is both an individual interest and public concern as to marriage and divorce law, and the difficult legislative and judicial task is to reconcile these conflicting interests so that there is a maximum of individual freedom which comports with necessary and compelling regulation in the public interest. No longer may it be assumed that the individual's interest perforce must make way for an assertion of state police power. The objective or purpose of marriage regulation, and the means employed, are subject to constitutional challenge, and depending upon whether Mr. Justice Goldberg's approach in Griswold, or the unanimous opinion in Loving is adopted, the burden may rest upon the state to justify the regulation, or upon the assailant to prove irrationality or unreasonableness. Perhaps the choice between these alternatives depends upon the practical consequences of decision in the particular case. In any event, for better or worse, the slogan that "marriage is a basic civil right of man" may have as profound an effect upon the law of marriage and divorce as the maxim res ipsa loquitur had upon the law of torts. Hopefully, however, the slogan will not impede reasoning about the pragmatic consequences of decision.

Fornication, illegitimacy, and bastardy are subject to constitutional challenge because they induce marriage to escape penalty and hence interfere with free choice. Sed quære. Although an abuse of such laws may raise constitutional issues, a legitimate public concern probably justifies the statutes.

167. See Drinan, supra note 62, at 376-77.