

Carl E. Schneider: Work on Family Law

I Selected Bibliography of Carl Schneider's Writing on Family Law

A Reports

1 Council on Family Law, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* (Dan Cere, Principal Investigator) (Carl E. Schneider: Member of the 21 person Council on Family Law) (2005).

B Books

1 Carl E. Schneider and Margaret F. Brinig, *AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS AND PERSPECTIVES* (2nd Ed. 2000) (West Casebook Series).

2 Lee E. Teitelbaum, Margaret F. Brinig, and Carl E. Schneider, *FAMILY LAW IN ACTION: A READER* (1999).

3 Carl E. Schneider and Margaret F. Brinig, *AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS AND PERSPECTIVES* (1996) (West Casebook Series) ("Putting Traditional Marriage to the Test: Homosexual Marriage," pages 40-58).

C Book Chapters

1 Carl E. Schneider, "Fixing the Family: Legal Acts and Cultural Admonitions." in *REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY: AN AGENDA FOR STRENGTHENING MARRIAGE*, 177-83, (A. J. Hawkins et al. eds.) (2002).

2 Carl E. Schneider, "The Law and the Stability of Marriage: The Family as a Social Institution," in *PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA* (David Popenoe, Jean Bethke Elshtain and David Blankenhorn eds.) (1996).

D Law Review Articles

1 Carl E. Schneider, "Strangers and Brothers: A Homily on Transracial Adoption." 2 *WHITTIER J. CHILD & FAM. ADVOCACY* 1 (2003).

2 Carl E. Schneider, "On the Duties and Rights of Parents," 81 *VA. L. REV.* 2477 (1995).

3 Carl E. Schneider, "Marriage, Morals and the Law: No Fault Divorce and Moral Discourse," 1994 *UTAH L. REV.* 503 (1994).

4 Carl E. Schneider, "The Channeling Function in Family Law," 20 HOFSTRA L. REV. 495 (1992).

5 Carl E. Schneider, "Religion and Child Custody," 25 U. MICH. J.L. REFORM 879 (1992).

6 Carl E. Schneider, "Rethinking Alimony: Marital Decisions and Moral Discourse," 1991 B.Y.U. L. REV. 197 (1991).

7 Carl E. Schneider, "Discretion, Rules and Law: Child Custody and the UMDA's Best-Interest Standard," 89 MICH. L. REV. 2215 (1991).

8 Carl E. Schneider, "Moral Discourse and the Transformation of American Family Law," 83 MICH. L. REV. 1803 (1985)

9 Carl E. Schneider, "The Next Step: Definition, Generalization and Theory in American Family Law," 18 U. MICH. J.L. REFORM 1039 (1985).

10 Carl E. Schneider, "Fornication, Cohabitation, and the Constitution," 77 MICH. L. REV. 252 (1978) (student note).

E Book Reviews

1 Carl E. Schneider, Book Review of "A Silent Revolution: Routine Policy Making and the Transformation of Divorce Law in the United States" by Herbert Jacob, 86 MICH. L. REV. 1121 (1988).

2 Carl E. Schneider, Book Review of "In the Interest of Children: Advocacy, Law Reform, and Public Policy," by Robert H. Mnookin, Robert A. Burt, David L. Chambers, Michael S. Wald, Stephen D. Sugarman, Franklin E. Zimring, and Rayman L. Solomon, 84 MICH. L. REV. 919 (1986).

II Selected Excerpt from Schneider's Family Law Articles

A Carl E. Schneider, "The Channeling Function in Family Law," 20 HOFSTRA L. REV. 495 (1992).

1 Our legislator might, then, *posit a normative model of "marriage"* with several fundamental characteristics. *It is monogamous, heterosexual, and permanent.* It rests on love. Husbands and wives are to treat each other affectionately, considerately, and fairly. They should be animated by mutual concern and willing to sacrifice for each other. In short, they ought to assent to the old question: "Wilt thou love her, comfort her, honour, and keep her in sickness and in health; and, forsaking all others, keep thee only

unto her, so long as ye both shall live?" (pages 500-01) (footnotes omitted) (emphasis added).

- 2 Our legislator might see family law as setting a framework of rules, one of whose effects is to shape, sponsor, and sustain the model of marriage I described above: ***It writes standards for entry into marriage, standards which prohibit polygamous, incestuous, and homosexual unions.*** It seeks to encourage marital stability by inhibiting divorce (although it pursues this goal much less vigorously than it once did). It tries to improve marital behavior both directly and indirectly: It imposes a few direct obligations during marriage, like the duty of support. Less directly, it has invented special categories of property (like estates by the entirety and rights of dower and curtesy) to reflect and reinforce the special relationship of marriage. It indirectly sets some standards for marital behavior through the law of divorce. Fault-based divorce does so by describing behavior so egregious that it justifies divorce. Marital-property law implicitly sets standards for the financial conduct of spouses. Finally, prohibitions against non-marital sexual activity and discouragements against quasi-marital arrangements in principle confine sexual life to marriage. "What is all this," James Fitzjames Stephen emphatically asked, "except the expression of the strongest possible determination on the part of the Legislature to recognize, maintain, and favour marriage in every possible manner as the foundation of civilized society?" (page 502) (footnotes omitted) (emphasis added).
- 3 A second channelling technique is to reward participation in an institution. Tax law, for instance, may offer advantages -- like the marital deduction -- to married couples that it denies the unmarried. Similarly, Social Security offers spouses benefits it refuses lovers. ***These advantages are enhanced if private entities consult the legal institution in allocating benefits, as when private employers offer medical insurance only to "family members" as the law defines that term.*** In a somewhat different vein, the law of alimony and marital property offers spouses -- but generally not "cohabitants" -- protections on divorce. (Page 503) (emphasis added).
- 4 In the last few decades, family law has been transformed, and perhaps the family has too. It is often said that families increasingly live in non-traditional arrangements and that even when they don't their internal relations have vitally changed. Arland Thornton, for instance sees a "decreased emphasis upon conformity to a set of behavioral standards in the family arena and an increased emphasis on individual freedom. . . ." ***In recent decades, more specifically, the divorce rate has risen impressively. There are more unmarried cohabitants. Non-marital sexual activity has increased. Homosexuality has lost some of its stigma.*** Single parents are more numerous. More broadly, one hears that families "are becoming internally deinstitutionalized, that is, their individual members are more autonomous and less bound by the group[,] and the domestic group as a whole is less cohesive. . . . Examples of this are the decline of economic interdependence between husband and wife and the weakening of parental authority over children." Are these changes so extensive that the family has become wholly

"deinstitutionalized"? Has it grown unreasonable to speak of the family in terms of social institutions? Has the channelling function thus been put out of business in family law? (Pages 513-14) (footnotes omitted) (emphasis added).

5 ***One noteworthy feature of recent legal change is the occasional governmental recognition of "functional equivalents" of the family.*** Perhaps the best-known instance is *Marvin v. Marvin*. There, the California Supreme Court invited cohabitants to arrange their affairs contractually and to invoke a broad set of equitable doctrines. *Marvin* may thus have given cohabitants some marriage-like protections. *Braschi v. Stahl Associates, Co.* held that a homosexual couple could be a "family" within the meaning of the New York City Rent and Eviction Regulations. In *Moore v. City of East Cleveland*, the United States Supreme Court decided that a grandmother living with a son and two grandchildren, one of whom was not the son's child, were a "family" for purposes of a constitutional challenge to a zoning ordinance. And in *Smith v. OFFER*, the Court intimated that people employed by the state as foster parents might acquire a "parental" interest in their foster children strong enough to give them some of the constitutional rights of natural parents. ***To like effect are the occasional "domestic partner" ordinances and regulations which seek to give spouse-like benefits to unmarried cohabitants.*** (Pages 514-15) (footnotes omitted) (emphasis added).

6 First, the world may not have changed quite so much and so simply as people -- and courts -- sometimes seem, rather casually, to assume. Social change is as monolithic and complete as we perceive it to be. The restructuring of family life may be no exception to that rule, for example, as early as 1964, that barometer of the conventional wisdom -- the cover of *Time* magazine -- announced that America had undergone a "sexual revolution." This revolution has ever since been widely taken as having the most thoroughgoing proportions. But one particularly extensive and careful study of sexual attitudes conducted as late as 1970 concluded: "We have doubts that such a revolution occurred." That study's data demonstrated

one striking fact: with regard to many forms of sexual expression, our respondents were extremely conservative. ***A majority disapproved of homosexuality, prostitution, extramarital sex, and most forms of premarital sex.*** Furthermore, except for masturbation and for premarital sex between people who are in love, our data suggest that a majority of Americans are "moral absolutists" in that they see these behaviors as *always* wrong.

A more recent student concluded that the changes in sexual attitudes over the last several decades

hardly amount to a Sexual Revolution. They are both smaller and more nuanced than aptly fits a revolutionary characterization. . . . Notable increases in approval of premarital sex (including cohabitation), sex education, and birth control did occur over the last generation. ***However, at least since the early 1970s there appears to have been no liberal shift, and even some conservative movement, in attitudes on homosexuality, extra-marital sex, and pornography.*** (Page 516)

(footnotes omitted) (emphasis added).

7 A second limitation of the channelling function is that its technique of promoting one institution by disadvantaging the alternatives can be troubling. Where the alternative is immoral and socially harmful, this concern is, to be sure, much tempered. **Originally many alternative institutions – polygamy, adultery, fornication, and homosexuality, sexuality, for instance – were generally condemned on these grounds. Thus it was considered fair not just to disadvantage them, but to criminalize them.** As views on at least some of those subjects have changed, that response looks less satisfactory. But the problem is broader. Even if unmarried cohabitation, for example, is immoral, should it be discouraged by denying its practitioners the law's services in resolving their disputes? Doing so may in practice allow one miscreant actually to profit by taking advantage of another. And in at least one situation -- illegitimacy -- those who suffered most from the channelling function's operation -- illegitimate children -- were also those who were morally blameless. (Page 519-20) (emphasis added).

8 n60 THEODORE CAPLOW ET AL., MIDDLETOWN FAMILIES: FIFTY YEARS OF CHANGE AND CONTINUITY 323 (1982). Further, it is possible to see American family law as:

in some ways . . . surprisingly resistant to the pressures of cultural fragmentation. . . . [T]he Supreme Court has not yet extended the concept of constitutional privacy to include sexual relations between unmarried adults. . . . [T]he Court . . . does not give preferred constitutional status to relationships between unmarried partners. . . . **[N]o state yet recognizes the legality of homosexual marriage. . . . [S]tate laws that define the term "family" have remained relatively stable.** The rights of children and spouses under inheritance, tax, and wrongful death laws are confined to relationships based on marriage and/or kinship. Even the famous Lee Marvin "palimony" case in California was based on a contract theory, because the California Supreme Court did not equate cohabitation with marriage and it viewed the state's family law code as inapplicable.

Hafen, *supra* note 27, at 6-7 (Page 517) (footnote omitted) (emphasis added).

B Carl E. Schneider, "Discretion, Rules and Law: Child Custody and the UMDA's Best-Interest Standard," 89 MICH. L. REV. 2215 (1991)

1 It might also be said that we are moving away from rules toward discretion in defining "family." **Earlier law essentially held that a family is a unit formed either by marriage or by (particularly close) blood relation. The tendency of the law is now toward greater judicial discretion in deciding what a family is, discretion courts have sometimes exercised by defining as a family what they take to be the functional equivalents of traditional families.** The Marvin doctrine, for instance, can be understood in those terms, as can *Braschi v. Stahl Associates Co.* n64 and *Moore v. City of East Cleveland*. Similarly, it might be said that the meaning of "parent" has become more discretionary (or at least has become uncertain enough that it has to be defined by courts and legislatures).

Courts are increasingly inclined, for example, to treat people other than natural parents (stepparents, for instance) as plausible contenders for custody, and scientific ingenuity has compelled courts and legislators to identify the parents of children produced through artificial insemination, *in vitro* fertilization, and surrogate mother contracts.

n64 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989). *Braschi* held that a homosexual couple could be a "family" within the meaning of the New York City Rent and Eviction Regulations. (Pages 2230-31) (emphasis added).

- 2 There is a third reason for treating cautiously fears that judges will substitute personal for public standards. In some of the circumstances in which judges are conventionally taken to be doing so, they may in fact simply be reflecting just the kind of social consensus Professor Mnookin seeks. As has been acutely observed,

[t]here is substantial evidence that courts applying the best interest standard do so in a way that is favorable to mothers, and fathers typically do not prevail in custody disputes unless they are able to demonstrate that the mother has some serious disability. These results are often attributed to the insidious biases of judges. Another explanation is that judges in awarding custody to mothers are continuing to track a powerful social norm which, in fact, has not suffered significant erosion. There is ample evidence today that mothers continue to assume the major responsibilities of caring for children.

As examples of the danger he is discussing, Professor Mnookin lists custody cases involving extramarital sexual relations, lesbian mothers, illegitimate children, religious fanaticism, unconventional beliefs, and dirty houses. But, in many of these situations too, judges who consult these criteria may be reflecting a widespread, and sometimes even carefully considered, community viewpoint. That viewpoint may be wrong, but the fault would then lie in the community's error, not in the judge's substitution of private for public standards. (Pages 2266-67) (footnotes omitted) (emphasis added).

- C Carl E. Schneider, "Moral Discourse and the Transformation of American Family Law," 83 MICH. L. REV. 1803 (1985)

- 1 *In child-custody law, moral discourse has been reduced by the legislative and judicial erosion as proper bases for decision of various issues of morality, particularly sexual morality, such as nonmarital cohabitation and homosexuality, which were once thought relevant.* Thus the Uniform Marriage and Divorce Act (a "barometer of enlightened legal opinion") provides, "The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child." As the Commissioner's Note explains, "This provision makes it clear that unless a contestant is able to prove that the parent's behavior in fact affects his relationship to the child (a standard which could seldom be met if the parent's behavior has been circumspect or unknown to the child), evidence of such behavior is irrelevant." Further, legislatures and courts have, by limiting discussion to the psychological well-being of the child, tried to close off the consideration

of morals and values that the "best interests of the child" standard once seemed to invite. (Page 1811) (footnotes omitted) (emphasis added).

2 ***Laws against homosexuality may be in an earlier stage of a similar process.*** Although the Supreme Court summarily and delphically affirmed a lower-court ruling refusing to find Virginia's sodomy statute unconstitutional, a number of state courts have held that such statutes infringe the right of privacy, and ***a number of states and towns have written antidiscrimination statutes or ordinances protecting homosexuals.*** (Page 1818) (footnotes omitted) (emphasis added).

3 ***One cause of the sexual revolution has been the waning influence of Christianity among the relatively affluent, educated elite.*** There are, surely, many believers left among this group. But many of them believe in a liberal Christianity whose moral views on family law matters have long parted from those of traditional Christianity and of conservative churches.ⁿ¹⁵⁸ And even Catholics and conservative Protestants now give sexual relations -- albeit only within marriage -- that same unctuous importance given them by psychologized nonbelievers.

ⁿ¹⁵⁸ HABITS OF THE HEART, *supra* note 5, at 62-65, 219-49. Christianity's influence on American family law deserves much more thorough treatment than is possible here. That influence has necessarily been great, since the U.S. is a more religious country than any of its Western counterparts. *Id.* at 219; T. CAPLOW, H. BAHR, B. CHADWICK, D. HOOVER, L. MARTIN, J. TAMNEY & M. WILLIAMSON, ALL FAITHFUL PEOPLE: CHANGE AND CONTINUITY IN MIDDLETOWN'S RELIGION 26-27 (1983). In the Progressive era, for instance, much of the debate over divorce rates and divorce reform was carried on among spokesmen for the various branches of Christianity. W. O'NEILL, DIVORCE IN THE PROGRESSIVE ERA (1967). And in a country whose religious forms are so much more varied than those of its Western counterparts, that influence has been necessarily complex. Consider, for instance, this sample of American Christian thought on the nature of marriage: Mormons once practiced polygamy (some still do, as demonstrated by *In re Black*, 3 Utah 2d 315, 283 P.2d 887, cert. denied, 350 U.S. 923 (1955)); liberal Protestants see benefits in serial monogamy, conservative Protestants countenance it, Roman Catholics do not; ***some liberal Protestants would permit homosexuals to marry, some conservative Christians would prefer to see them burn;*** some Christians believe marriage the only proper locus of sexual relations, many do not; and the Shakers practiced celibacy, while Christian Scientists look forward hopefully to the day when sexual relations will be unnecessary for reproduction. (Pages 1843-44) (emphasis added).

4 ***These changes in religious beliefs deeply undercut traditional family law, for much of it comes from the law of the English ecclesiastical courts and rests on classic Christian attitudes toward sexual matters.*** About those attitudes, Professor Rieff writes, "renunciatory controls of sexual opportunity were placed in the Christian culture very

near the center of the symbolic that has not held." Quoting von Harnack, Rieff continues, At bottom, only a single point was dealt with, abstinence from sexual relationships; everything else was secondary: for he who had renounced these found nothing hard. Renunciation of the servile yoke of sin (*servile peccati iugum discutere*) was the watchword of Christians. . . . Virginity was the specifically Christian virtue, and the essence of all virtues; in this conviction the meaning of the evangelical law was summed up.

Such beliefs are now rejected or even unrecognized by many Christians, and the altered social role of American Christianity has made them virtually incomprehensible to many Americans.

In other words, because religious views are less universally and strongly held, statements of moral aspiration linked to religion have slipped more readily from legal discourse. This change is visible, for example, in the child-custody area, where evidence of concern for the moral welfare of the child -- as instanced, for example, by evidence that the parent sends the child to Sunday school -- is increasingly thought irrelevant. Because religious views on marital obligations have changed, the move to no-fault divorce was eased, and perhaps even made more necessary. *Similarly, because religious views on sexual relations outside of marriage have changed, the law's tolerance, and even encouragement, of such relations has increased, as Marvin et al. indicate. Abortion, neonatal euthanasia, and homosexuality are but a few more examples of areas in which the changing nature and weight of religious views have helped change legal views and language.* (Pages 1844-45) (footnotes omitted) (emphasis added).

- 5 *The new conservative moral view has thus injected moral discourse into the law, and it has certainly become prominent in political and social discourse.* But the extent to which that moral view has been enacted into law is less dramatic than the vehemence of political and social discussion of it suggests. For example, despite the prominence of the abortion issue, none of the attempts to reverse or seriously undermine *Roe v. Wade* has been successful. Or consider what was to have been the legislative centerpiece of the new conservative view of the family -- *the Family Protection Act*. That bill was intended to "preserve the integrity of the American family, to foster and protect the viability of American family life by emphasizing family responsibilities in education, tax assistance, religion, and other areas related to the family, and to promote the virtues of the family." It would have, inter alia, instituted a presumption in favor of an expansive interpretation of parental rights; required parental notification whenever a program receiving federal funds gave abortion or contraception counseling or services; required federal programs not to change state legislation on juvenile delinquency, child abuse, or spouse abuse; *prevented federal funds from being used to promote homosexuality "as a life style"* or to provide legal services for securing a divorce; and extensively amended tax and education law in ways thought to secure the general purpose of the bill. The bill's scope is thus striking; *its appeal to a substantial portion of the population is clear*; and it probably would not have received the attention the press has paid it had it been introduced earlier. *For our purposes, however, perhaps the significant fact is that the*

bill has never become law. (Pages 1872-73) (footnotes omitted) (emphasis added).

III **Excerpts from Selected Articles Acknowledging Schneider's Contributions and Comments**

A **Joan L. Larsen, "Importing Constitutional Norms from a 'Wider Civilization': Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation," 65 OHIO ST. L. J. 1283 (2004)**

1 Joan Lawsen: * Adjunct Professor of Law, University of Michigan Law School. B.A. University of N. Iowa; J.D. Northwestern University School of Law. I would like to thank Lisa Schultz Bressman, Steven G. Calabresi, Evan H. Caminker, Don Herzog, Ronald J. Mann, Carl E. Schneider, Marc Spindelman, and Ernest A. Young for helpful comments on earlier drafts of this Article. (Page 1283).

2 It would be an understatement in the extreme to call the Supreme Court's decision in *Lawrence v. Texas* revolutionary. The Court, overruling a precedent only seventeen years old, held that the Constitution forbids states from criminalizing homosexual sodomy. *On the merits, the decision was praised by liberals and libertarians, decried by conservatives, and set the stage for the current debate over the propriety and constitutionality of restrictions on same-sex marriage.* (Pages 1283-84) (footnoted omitted) (emphasis added).

3 Distancing itself from its precedent in *Bowers v. Hardwick*, which, of course, held that the Constitution did not forbid states from criminalizing homosexual sodomy, the Court in *Lawrence* explained that "to the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere." As evidence of the "wider civilization[']s" rejection of *Bowers*, the Court noted that the European Court of Justice had held, both before and after *Bowers*, that laws forbidding homosexual conduct violated the European Convention on Human Rights. The Court went on to note that "other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct." Indeed, the Court announced, "the right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent." (Page 1284) (footnotes omitted).

B **Margaret F. Brinig, Book Review: "Status, Contract and Covenant: A Review of Family Law and the Pursuit of Intimacy," by Milton C. Regan, Jr., 79 CORNELL L. REV. 1573 (1994).**

1 Margaret F. Brinig: * Professor of Law, George Mason University. I would like to thank

Lloyd Cohen and Carl Schneider for their helpful suggestions, Bryan Beier for his valuable research assistance and comments, and the Sarah Scaife Foundation for its financial support. (Page 1573).

- 2 *Although his criticism of the contract model is effective, Regan's analysis falls short precisely because he strives for fairness and sensitivity. In assuming a defensive posture, he dilutes a powerful analogy to avoid criticism by feminists and gay rights advocates.* Regan quickly points out the weakness of status as describing intimacy: historically, status connoted hierarchy, male dominance, and Victorian attitudes. However, Regan assures us that status need not be so encumbered. Regan advocates a refined status by using new default terms for families that would encourage security and intimacy, and discourage inequality. Under this model of status, the American family could then recapture only the golden parts of an earlier era. (Page 1574) (emphasis added).
- 3 Already we can see the strengths and weakness of Regan's work. In criticizing contract and advocating greater moral responsibility, Regan avoids making certain judgments. *For example, his work is carefully neutral about such diverse topics as law and economics, feminism, and same sex relationships.* He discusses the topics of status and morality at length, while referring to religion only in passing. However, his ultimate goals, strengthening the family, reinventing fatherhood, and reawakening community, deserve only praise. (Page 1578) (footnoted omitted) (emphasis added).
- 4 Having persuaded us that seeing the family in terms of status is important, *Regan continues by enlarging the definition of family. He maintains that "the moral aspiration that marriage has expressed is not heterosexual intimacy per se, but the more general vision of responsibility based on the cultivation of a relational sense of identity."* In particular, in Chapter five, Regan extends the protection of intimacy to same-sex relationships. For Regan, the primary relational values are intimacy and stability. He therefore would extend the benefits of status to same-sex relationships while removing it from unmarried cohabitation. However, he suggests that because stability and intimacy are more prevalent in marriage, legal rules ought to clearly distinguish between marriage and cohabitation: "A new model of status would be sympathetic to the claim that the social interest in promoting marriage justifies preserving a firm distinction between the legal treatment of married and unmarried couples." Cohabitation is frequently preferred because it avoids the obligations of marriage. Since women in long term relationships have tended to rely less on their own market incomes, and have invested more than their partners in "household production," allowing cohabitation to replace marital obligations would also have a gendered impact. Regan would give incentives to marry by encouraging the idea that obligation in certain instances can arise from the fact of relationship itself. (Pages 1588-89) (footnotes omitted) (emphasis added).
- 5 To test the covenant model in terms of how it comports with practical and aspirational standards, we must reexamine Regan's hard cases involving same sex

some legal recognition and protection. *She strongly suspects that "homophobia," like most cultural phenomena, has a functional origin in the instincts of parents to transmit their culture to future generations.* The Senator thus regards existing sodomy laws as a kind of contract between the state and young parents, perhaps especially between the state and fathers. *By its sodomy law, the state is saying to the prospective spouse-parent: "If you will control your desires and restrict yourself to this condition of monogamy for the benefit of your children and the future generations, we will do what we can to assure your participation in those future generations by discouraging your children from relations and lifestyles which would deprive you of the prospect of grandchildren who know and respect your values."* (Pages 892-93) (footnotes omitted) (emphasis added).

- 4 Thus, a few years ago, Thomas Grey made an argument for constitutionalizing the protection of homosexuals against the threats of sodomy law on the basis of a suggested need to prevent violence and control the gay community. His utterance was made, however, before the Right-to-Life movement hit the streets in force. Extended to the present situation, his argument would lead to reconsideration of *Roe v. Wade* in order to still the crowd in the street. Perhaps later its reinstatement would be called for when the Right-to-Life mob retired in satisfaction and was replaced by an equally angry feminist mob demanding a judicially decreed right to abortion on demand. (Pages 904-05) (footnotes omitted).