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## Burial of Family Law, The

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# THE BURIAL OF FAMILY LAW

Emily J. Sack\*

## ABSTRACT

*In recent times, family law has appeared to play a prominent role in public and scholarly debates, as issues such as same-sex marriage and the proper definition of “family” have become the focus of attention. This Essay argues that despite appearances, a broader view of family law developments over the past several years reveals this law’s increasing irrelevance to legal decisions governing important issues in intimate relationships. Moreover, because family law is so often used as a proxy for issues concerning women, its diminishment also impairs women’s autonomy, both in and out of family relationships. The Essay briefly reviews some of the current debates in family law and identifies certain principles shared by scholars with varied perspectives, including a minimization of individual rights and an insistence on the incorporation of moral values into family structures. Through an analysis of *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), the Essay demonstrates how these common principles have given the legal system the opportunity to restrict women’s rights.*

*The Essay then examines several ways in which the legal system has excluded family law from consideration, including inter-spousal tort immunity, domestic violence, and the domestic relations exception. A discussion of recent cases such as *United States v. Morrison*, 529 U.S. 598 (2000), and *Castle Rock v. Gonzales*, 545 U.S. 748 (2005), demonstrates that this exclusion is not a thing of the past. The Essay goes on to delineate how scholars have separated family law from constitutional privacy jurisprudence to the detriment of individuals in families, particularly women. Finally, the Essay discusses the isolation of family law in the legal academy, and considers the impact this has had on the status of both family law and women in the legal system. The Essay concludes that family law must be refocused to value the rights of individuals in families, including the promotion of women’s autonomy, and to remove moral values from the definition of family. Otherwise, family law will not be consulted when the critical decisions regarding family relationships are made, but instead will be buried for good.*

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\* Professor of Law, Roger Williams University School of Law. I presented an early version of this Essay at the Workshop on Feminist Legal Theory and the Family, which was held at the Emory University School of Law in September 2007. I would like to thank Martha Fineman and all of the participants in the workshop for their extremely helpful comments. I also am grateful to my research assistants, Teresa Giusti and Eric Shamis, for their excellent work on this project.

## TABLE OF CONTENTS

INTRODUCTION .....	460
I. THE APPARENT PROMINENCE OF FAMILY LAW ...	461
A. MORALITY AND INTIMACY .....	461
B. THE PROBLEM .....	463
II. <i>GONZALES V. CARHART</i> : FAMILY VALUES.....	463
A. SELFISHNESS, REVISITED .....	463
B. MORAL OBJECTIONS .....	466
III. THE BANISHMENT OF FAMILY LAW .....	468
A. THE FAILURE OF FAMILY LAW TO GARNER COURT ATTENTION .....	468
B. THE INVISIBILITY OF FAMILY LAW IN FEDERAL AND CONSTITUTIONAL LAW .....	473
C. FAMILY LAW'S REJECTION OF THE CONSTITUTIONAL RIGHT TO PRIVACY .....	476
D. FAMILY LAW IN LAW SCHOOLS: LIFE IN THE GHETTO .	479
CONCLUSION .....	482

## INTRODUCTION

SOMETIMES we bury things for safekeeping; sometimes we just want to give the dead a final resting place. In recent years, the battle over the development of family law has reached fever pitch. The debates over the proper definition of family and the legitimacy of moral judgments as the basis for law governing intimate relationships are just two examples of the prominence to which family law has risen.<sup>1</sup> It appears that family law is a critical tool for understanding and deciding the issues which we hold most dear. It is a precious commodity that can define and keep our fundamental values safe. However, despite the apparent importance of family law in recent times, we actually may be witnessing a body of law in its death throes. A broader view of family law developments over the past several years instead reveals the failure of this law to provide a basis for legal decisions concerning important issues in intimate relationships. Moreover, because family law encompasses many issues involving women, its diminishment also impairs the rights of women, both in and out of family relationships.

In Part I of this Essay, I examine some current debates in family law which assume that this law plays a significant role in guiding the development of familial structures and intimate relationships. In Part II, through the lens of the Supreme Court's recent decision in *Gonzales v. Carhart*,<sup>2</sup> I analyze how certain commonalities among various sides in these debates have harmed the position of women in intimate relationships. I argue

1. See, e.g., Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1208 (1999) ("The family has become the symbolic terrain for the cultural war in which our society is increasingly mired.").

2. 127 S. Ct. 1610 (2007).

that by minimizing the importance of individual rights and insisting on the continued relevance of moral values in structuring family relationships, the current focus of family law debates has given the legal system an opportunity to further restrict women's autonomy. Part III analyzes the ways in which the legal system has excluded family law from consideration and undermined its significance. I review both the past treatment of family law by the courts and its continuing exclusion in such recent decisions as *Castle Rock v. Gonzales*<sup>3</sup> and *United States v. Morrison*.<sup>4</sup> I then discuss how constitutional right to privacy jurisprudence has been separated conceptually from family law, and the consequences both for family law and for women. The last section in Part III examines how the isolation of family law in the legal academy both confirms and reinforces its handling by the court system. In the Conclusion, I argue that we must revise our construction of family law if we are to save it, and women's autonomy, from an early grave.

## I. THE APPARENT PROMINENCE OF FAMILY LAW

### A. MORALITY AND INTIMACY

Family law scholars from a variety of perspectives have argued that family law has had a powerful impact on the decline of the traditional family. Some of these scholars contend that family law has disassociated moral values from the law and discredited the right of the law to make moral judgments about human relationships.<sup>5</sup> Through a series of legal changes, including the rise of no-fault divorce; custody decisions without regard to parental sexual behavior; increased recognition of non-marital partner relationships, including both heterosexual and same-sex couples; enforceability of pre-nuptial agreements; and the burgeoning of children's rights, the institution of the family has ceased to embody moral values and has become destabilized.<sup>6</sup> It can no longer function as an entity that mediates between the individual and the state, and has disintegrated into a fragmented collection of individuals with conflicting desires, regulated only through private decision-making.<sup>7</sup> In order to be

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3. 545 U.S. 748 (2005).

4. 529 U.S. 598 (2000).

5. See, e.g., Carl Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1855-60 (1985); Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1, 5.

6. See, e.g., MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 36-39 (1993); Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L. J. 1519, 1534-35 (1994); John DeWitt Gregory, *Redefining the Family: Undermining the Family*, 2004 U. CHI. LEGAL F. 381, 391-92; Hafen, *supra* note 5, at 26-30; Harry D. Krause and David D. Meyer, *What Family for the 21st Century?*, 50 AM. J. COMP. L. SUPP. 101, 103 (2002); Schneider, *supra* note 5, at 1809-18.

7. See generally REGAN, *supra* note 6, at 47-51 (discussing the "negotiated family" in which individual choice holds greater value than obligation and commitment to other family members); Carl Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992); Hafen, *supra* note 5, at 4, 25-30; Dolgin, *supra* note 6, at 1560-61 (noting that the creation and operation of families has increasingly become a matter of private choice, where adult family members function as "business associates, free to negotiate the

revitalized and, most importantly, to protect and promote the welfare of children, moral values need to be re-infused into family law.<sup>8</sup>

Other family law scholars welcome and promote diversity in family forms and relationships while rejecting the gender hierarchy present in the traditional nuclear family. However, for this group as well, morality is an important component of family law.<sup>9</sup> Armed with this new concept of diversity, family law can promote the responsible caretaking and commitment that is critical to children's welfare, while also promoting new values of fairness and equality.<sup>10</sup> This group contends that moral values have not disappeared from familial relationships, but instead have been reconfigured into a broader conception of family. Though this group may not find individual rights antithetical to familial commitments, as the first group does, both groups of scholars share a focus on the centrality of a moral vision in family law that promotes interdependency and nurturing relationships. Thus, both groups believe that family law has the power to transform social institutions through changes in family relationships.

The growing importance of issues surrounding same-sex marriage has reinforced the view that family law is now at the forefront of legal discourse and will play an influential role in the definition and substance of our intimate relationships. Some scholars have contended that expanding definitions of "family" have created instability in these relationships, fostered a lack of responsibility, and ultimately harmed children.<sup>11</sup> Others have welcomed this expansion, and argue that defining marriage to include same-sex couples can only increase the commitment to familial relations and provide stability to children.<sup>12</sup> Both groups, however, view family law as the central battleground for these arguments about same-sex marriage.

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terms of relationships and the terms of their demise"). This individualism harms not only other family members, but the individual himself, who feels the "waning of belonging." Hafen, *supra* note 5, at 32.

8. See, e.g., Margaret F. Brinig, *Status, Contract and Covenant: A Review of Family Law and the Pursuit of Intimacy*, 79 CORNELL L. REV. 1573, 1574-75 (1994) (advocating the concept of covenant to describe family relationships, which avoids the sexist and hierarchical connotations of status while going beyond contractual conceptions of private bargaining between individuals); Schneider, *supra* note 5, at 1806.

9. See, e.g., Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 245 (1997) ("Rather than questioning the morality of contemporary discourse in family law, the new family morality movement recognizes that contemporary family law celebrates a range of different moral values."); Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1115 (1999) (arguing that "contemporary family law has not retreated from morality," but that values now "reflect both a broader understanding of morality and a reconceived notion of rights within the family").

10. See, e.g., Cahn, *supra* note 9, at 228-29; Martha Minow, *Forming Underneath Everything that Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819, 894.

11. See, e.g., Don S. Browning, *Linda McClain's The Place of Families and Contemporary Family Law: A Critique from Critical Familism*, 56 EMORY L.J. 1383, 1400 (2007) (book review).

12. See, e.g., REGAN, *supra* note 6, at 120-22.

## B. THE PROBLEM

The perspectives of both of these groups of family law scholars are problematic for several reasons. First, both groups focus on familial bonds and, to varying degrees, minimize the needs of individuals in families. Unfortunately, “individuals” in this context almost always means women. For women, a focus on their own autonomy can positively impact their lives in families. Second, the talk about moral values, however defined, ends up hurting women, so that we should stay away from arguments about infusing moral values through familial relationships. Third, these scholars seem unconcerned with the fact that family law has been tossed by the wayside in legal discourse in the past and continues to be shunned in a variety of ways. Fourth, the diminishment of individual needs in family law has had important negative consequences in its relation to the development of constitutional privacy law and served to increase its own irrelevance to important constitutional debates. Therefore, I question whether family law can serve the purpose of guiding us through current controversies in gender relationships, and individual and family autonomy.

In the next section, I examine my first two concerns, family law’s characterization of a focus on individual rights as selfish and the centrality of moral values in family law, through a discussion of the Court’s most recent case on reproductive rights, *Gonzales v. Carhart*.<sup>13</sup>

## II. GONZALES V. CARHART: FAMILY VALUES

### A. SELFISHNESS, REVISITED

An underlying theme of those scholars proposing a re-focusing on collective responsibility and commitment within families is that family relationships are distinct because they demand self-sacrifice and repudiate self-interested behavior. Interactions within the family “derive [ ] from an *unlimited* personal commitment, not merely to another person, but to the good of the relationship or the family entity as a larger order.”<sup>14</sup> For some family law scholars, individual autonomy promotes the selfishness of family members toward one another.<sup>15</sup> Couples fail to make lasting commitments and parents abandon childrearing responsibilities for their

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13. 127 S. Ct. 1610 (2007).

14. Hafen, *supra* note 5, at 23; *see also* Brinig, *supra* note 8, at 1595-96 (noting that unlike parties to a contract, family members are willing to “give beyond what is fair”); Dolgin, *supra* note 6, at 1566-67 (arguing that though the traditional family may have sanctioned inequality, it “also fostered a sense of responsibility anchored in the dictates of natural and sacred truth” and advocating for maintaining this sense of responsible community within the family while abandoning its traditional inequalities).

15. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1511-13 (noting the shift in focus on marriage as an important societal institution to one that can promote individual happiness). Singer also describes the change in the view of parenting as important to children and society to a view in which parenting is an opportunity for adult personal fulfillment. *Id.* at 1513-14.

own convenience and self-interest.<sup>16</sup> Moreover, a focus on individual rights of family members may be a “dubious privilege,” because this very focus will destroy the family as an institution that mediates between the individual and the state; when this happens, there is no reason for protecting traditional family privacy.<sup>17</sup> But even if they do not believe that contemporary families are being destroyed by individualism, many family law scholars still focus on the need for self-sacrifice in families, particularly when the needs of children are involved.<sup>18</sup>

This concentration on selflessness in family relationships is worrisome, however, because it generally falls to the wives and mothers to sacrifice and take responsibility; it is their individual autonomy that seems to be selfish.<sup>19</sup> And in order to prevent selfishness, it is women’s autonomy that must be sacrificed. When the talk is of family bonds, connection, and the moral values of responsibility, ultimately women have lost their ability to make their own decisions and define their own lives.

A portion from the majority opinion in the recent case of *Gonzales v. Carhart* provides a striking example of the way selfishness is invoked to deny women autonomy. In *Gonzales*, the Court upheld the constitutionality of the federal Partial-Birth Abortion Ban Act of 2003, which criminalized certain medical procedures that are used to terminate a pregnancy in the second trimester.<sup>20</sup>

In its analysis of how the Act furthers the state’s legitimate interest in the potential life of the fetus, the Court undertook a lengthy explanation of a woman’s feelings in making a decision to terminate a pregnancy. The explanation is breathtaking in its arrogance. Without apology, the justices purported to speak for women during and after the decision-making process. While noting that “we find no reliable data to measure the phenomenon,” the majority stated that “it seems unexceptional to conclude some women come to regret their choice to abort the infant life they once

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16. Hafen, *supra* note 5, at 30.

17. Dolgin, *supra* note 6, at 1559, 1567-68. See also Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, 17 YALE J.L. & FEMINISM 221, 249-55 (2005) (discussing the importance of the marital family as a mediating structure that nurtures moral values and promotes civic virtue); Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 958-60 (1993) (arguing against a view of constitutional rights that focuses on individual privacy, while failing to recognize the critical role of the family as a mediating institution that creates a responsible citizenry).

18. Dailey, *supra* note 17, at 1019-20 (arguing that while the constitutional doctrine of individual privacy rights does provide autonomy to women that they did not previously have, “it nevertheless sacrifices the domestic virtues of altruism, love and dependence”). Dailey argues for a commitment to family, which includes just family relations that can serve to promote political citizenship in our democracy. *Id.* at 1023-27.

19. See Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1561 (1991) (arguing that although the liberal image of autonomous individuals making choices in their own self-interest is facially gender-neutral, it is in fact “covertly gendered”). Williams notes that “the ideology of conventional femininity condemns mothers who pursue self-interest over their children’s needs as ‘selfish.’” *Id.*

20. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1619 (2007).

created and sustained.”<sup>21</sup> Therefore, “[s]evere depression and loss of esteem can follow.”<sup>22</sup>

The Court explained that for this reason, some doctors will hide from women the actual details of the procedures that they will use to terminate the pregnancy.<sup>23</sup> Because the particular procedure banned by the Act may be especially upsetting, it is likely that it will not be explained to women. This lack of information concerning “the way in which the fetus will be killed” is of legitimate concern to the state, because it has an interest in ensuring that the woman’s decision is well informed.<sup>24</sup> And, if women receive information about this procedure, it is “a reasonable inference” that the result will be “to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions,” and to encourage doctors to find different and “less shocking” procedures.<sup>25</sup> Therefore, “[t]he State’s interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late term abortion.”<sup>26</sup>

This strained rationalization of the way in which the Act serves a legitimate state interest is based on an unsupported and patronizing view of women and their decision about whether or not to terminate a pregnancy. The justices assumed that women are anxious and emotional; doctors need to hide the truth about the procedure from them; women would be even more depressed when they learn afterwards how the abortion was performed; if women knew in advance, at least some would not proceed with an abortion and the state’s interest in protecting the potential life of the fetus would be served.

Further, this analysis bears no relation to the regulation that is actually at issue here. The Act does not require that a woman receive full information on the procedure to be used to terminate the pregnancy; it *bans* the procedure entirely. There is no “dialogue” and no fully-informed decision by the woman; her decision is taken away.<sup>27</sup> While the Court’s explanation appears to empower women to make a well-informed deci-

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21. *Id.* at 1634. See also Williams, *supra* note 19, at 1568 (arguing that the rhetoric of abortion as freedom to choose has harmed the reproductive rights movement, because it falls into the traditional view that characterizes a woman’s decision not to have children in favor of a career or other personal goals as “selfish”).

22. *Gonzales*, 127 S. Ct. at 1634. See also LINDA McCLAIN, THE PLACE OF FAMILIES AND CONTEMPORARY FAMILY LAW 239 (2006) (noting that the joint opinion in *Casey* upheld informed consent and waiting periods for abortions because “women are at risk for serious psychological consequences from abortion choices because they are ignorant about what abortion is”).

23. *Gonzales*, 127 S. Ct. at 1634.

24. *Id.*

25. *Id.*

26. *Id.*

27. See *id.* at 1648-49 (Ginsburg, J., dissenting) (“[T]he solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.”).



sion, the Act it upholds actually undermines a woman's ability to decide whether or not to terminate her pregnancy.

The Court begins this section of the opinion with the statement that "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child."<sup>28</sup> After analyzing the steps the opinion takes, the relevance of this statement becomes clear. The woman's unnatural rejection of this "bond of love" and her guilt for making the selfish decision to terminate her pregnancy necessitates that the state take away her choice to use the abortion procedure at issue in the Act. The regret and severe depression she suffers after her choice to terminate her pregnancy escalates to a "grief more anguished and sorrow more profound" when this particular procedure is used, and she realizes that "she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form."<sup>29</sup>

This depiction of the guilt-ridden woman selfishly making a decision she will come to regret stands in sharp contrast to the view of a woman's decision-making autonomy described in the part of the opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* which struck down a spousal notification provision.<sup>30</sup> The *Casey* Court explained how such a provision would effectively enable a husband to veto his wife's choice, and that a woman's inability to control decisions about childbearing would deny her ability to participate fully in society.<sup>31</sup> The *Casey* Court made the connection between a woman's decision-making autonomy and her dignity, personhood, and citizenship. In her dissent in *Gonzales*, Justice Ginsburg pointed out how the majority's analysis had failed to understand the link between independent decision-making and full personhood that had been made in *Casey*.<sup>32</sup>

We need to be wary of promoting an ideal of selflessness in family relationships. As *Gonzales* shows, if women do not conform to this ideal, they may be condemned as self-interested and unnatural in their rejection of "the bond of love the mother has for her child."<sup>33</sup> And it is this selfishness that permits the state to curtail her right to make choices about childbearing and, ultimately, to deny her full autonomy.

## B. MORAL OBJECTIONS

It is apparent that a moral vision of the family, which is nostalgic for traditional family structure and excludes alternative visions of intimate relationships, is harmful to women. It is therefore understandable why some commentators have attempted to win back the morality issue by arguing that alternative family structures are not immoral but simply pro-

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28. *Id.* at 1634.

29. *Id.*

30. 505 U.S. 833, 887-98 (1992).

31. *Id.* at 897-98.

32. *Gonzales*, 127 S. Ct. at 1640-41, 1649 (Ginsburg, J., dissenting).

33. *See id.* at 1634.

mote a different set of moral values focused on equality, fairness, and commitment.<sup>34</sup> In my view, however, putting alternative visions of family in moral terms can lead to the narrowing of women's choices and rights. The *Gonzales* majority's moral argument in support of restricting abortion rights demonstrates this concern.

To buttress its argument that the state's interest in banning the abortion procedure is legitimate, the *Gonzales* Court announced that "[n]o one would dispute that, for many, D&E is a procedure itself laden with the power to devalue human life."<sup>35</sup> The problem, according to the Court, is that the procedure bears a "disturbing similarity to the killing of a newborn infant."<sup>36</sup> Therefore, it would be legitimate for Congress to conclude that this procedure "implicates additional ethical and moral concerns that justify a special prohibition."<sup>37</sup> Just as the state can ban assisted suicide because it could lead to involuntary euthanasia, the Court reasoned, Congress can ban an abortion procedure because it seems close to infanticide.<sup>38</sup> Because we know that infanticide is wrong, apparently we can limit abortion because it makes some of us morally queasy too. The analogy made by the Court is inapt for several reasons, the most obvious of which is that abortion, unlike assisted suicide, has been recognized as a fundamental right. But according to the Court, the assisted suicide example demonstrates that Congress can ban all "practices that extinguish life" when they are close to conduct that is illegal.<sup>39</sup> The "moral concerns" of the state thus justify the restriction on a woman's right to decide whether or not to terminate a pregnancy.

As the dissent pointed out, the rationale of the Court's argument is not limited to the abortion procedure at issue in the case and could apply to prohibitions on any abortion.<sup>40</sup> The moral concerns evoked by the Court "are untethered to any ground genuinely serving the Government's interest in preserving life," and their use to justify legislation restricting matters of intimate choice is directly contrary to prior Court holdings.<sup>41</sup>

As both *Casey* and *Lawrence v. Texas*<sup>42</sup> made clear, moral beliefs are not legitimate bases for laws governing intimate relationships.<sup>43</sup> When we let morality in as a basis for determining intimate relationships, we open the door to the kind of argument exemplified in *Gonzales*. Moral values, no matter how we may want to define them, lead to moral judgments that we cannot control. Family law places women's equality in jeopardy when it places morality at the center of familial relationships.

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34. See *supra* text accompanying notes 9-10.

35. *Gonzales*, 127 S. Ct. at 1633.

36. *Id.* (citing congressional findings).

37. *Id.*

38. *Id.* at 1633-34 (citing *Washington v. Glucksberg*, 521 U.S. 702, 732-35 (1997)).

39. *Id.* at 1634.

40. *Id.* at 1647 (Ginsburg, J., dissenting).

41. *Id.*

42. 539 U.S. 558, 571 (2003).

43. *Gonzales*, 127 S. Ct. at 1647-48 (Ginsburg, J., dissenting).

Part III now considers the past and present treatment of family law by the courts and the legal academy. Both tell a sad story of isolation and rejection. The question is whether family law, at least as currently constituted, can be the locus for resolving the central issues of familial relationships.

### III. THE BANISHMENT OF FAMILY LAW

#### A. THE FAILURE OF FAMILY LAW TO GARNER COURT ATTENTION

Our history is replete with judicial statements on the impropriety of addressing family relations in a legal context. Because legal actions involving family relations often served as a proxy for claims concerning women's rights, the exclusion of these relationships from court consideration also had the effect of banning analysis of claims by and about women. The North Carolina Supreme Court expressed this view concisely in the nineteenth century case of *State v. Black*.<sup>44</sup> Unless violence by a husband against his wife is excessive:

the law will not invade the domestic forum or go behind the curtain. It prefers to leave the parties to themselves, as the best mode of inducing them to make the matter up and live together as man and wife should.<sup>45</sup>

Courts widely refused to consider claims involving conduct during marriage, even where the usual justification of preserving marital harmony was inapplicable. They based this refusal on a broad reading of the principles of coverture, in which a married woman could have no legal identity separate from that of her husband. For example, in *Abbott v. Abbott*, a divorced woman sued her former husband in tort for injuries he inflicted on her while they were married.<sup>46</sup> Cynthia Abbott did not debate that she could not have brought this suit against her husband while they were still married. She argued, however, that when injuries occur during marriage, a tort cause of action between spouses is suspended, but not destroyed.<sup>47</sup> Now that she and her husband were divorced, she could bring this suit. The Maine Supreme Court disagreed. It was not simply that the cause of action could not be brought during marriage; it was that no *right* had been created that could give rise to any future cause of action: "[t]here is not only no civil remedy but there is no civil right, during coverture, to be redressed at any time. There is, therefore, nothing to be suspended."<sup>48</sup> Marriage is "a perpetually operating discharge of all

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44. 60 N.C. (Win.) 266 (1864).

45. *Id.* at 267.

46. 67 Me. 304, 304 (1877). Among other acts, Ransom Abbott had assaulted his wife, Cynthia, restrained her with chains and transported her into an insane asylum where she was imprisoned. After she escaped, Ransom continued to threaten and harass her, so that she was forced to flee the state and go into hiding.

47. *Id.* at 306.

48. *Id.*

wrongs between man and wife, committed by one upon the other.”<sup>49</sup> Not only is this the law, but it is also good policy, according to the court, because otherwise divorce would open “new harvests of litigation” between former spouses, and “the private matters of the whole period of married existence might be exposed by suits.”<sup>50</sup>

The states’ passage of Married Women’s Property Acts that began in 1839 and continued through the 19th century had little effect on the courts’ view that wives were not able to sue their husbands. For example, in *Bandfield v. Bandfield*,<sup>51</sup> subsequent to divorce, a wife brought a tort action against her former husband for infecting her with a venereal disease while they were married.<sup>52</sup> Michigan’s Married Women’s Property Act stated that “[a]ctions may be brought by and against a married woman in relation to her sole property, in the same manner as if she were unmarried.”<sup>53</sup> The Michigan Supreme Court interpreted the statute not to include the right of a wife to sue her husband for personal wrongs committed during the marriage.<sup>54</sup> This would be a clear abrogation of long-established rules of common law, and if this was the legislature’s intent, it must state so explicitly; otherwise the law presumes that the Act did not intend to make such an alteration. To do otherwise, would be “another step to destroy the sacred relation of man and wife, and to open the door to lawsuits between them for every real and fancied wrong,—suits which the common law has refused on the ground of public policy.”<sup>55</sup> Despite the enactment of Married Women’s Property Acts in the 19th century, it was well into the 20th century before most states abrogated inter-spousal tort immunity.<sup>56</sup>

In the past twenty years, though the inter-spousal immunity doctrine has faded, the U.S. Supreme Court has repeatedly asserted that the law cannot provide a remedy for wrongs occurring between family members.<sup>57</sup> *Castle Rock v. Gonzales* is only the most recent decision in this

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49. *Id.* at 307.

50. *Id.* at 308. In *Callow v. Thomas*, 78 N.E.2d 637, 640-41 (Mass. 1948), the Massachusetts Supreme Judicial Court applied the same principle to a marriage that had been annulled.

51. 75 N.W. 287 (Mich. 1898).

52. *Id.*

53. *Id.*

54. *Id.* at 288.

55. *Id.*; see also *Peters v. Peters*, 42 Iowa 182, 184-85 (1875) (noting that despite eleven assaults and batteries by her husband, including one for which he was criminally convicted, a wife could not bring tort action against husband under statute which stated that a wife could “prosecute and defend all actions at law or in equity, for the preservation and protection of her rights and property, as if unmarried”).

56. See, e.g., *Merenoff v. Merenoff*, 388 A.2d 951, 962 (N.J. 1978); *Waite v. Waite*, 618 So. 2d 1360, 1361 (Fla. 1993); see also *Bozman v. Bozman*, 830 A.2d 450, 475 (Md. 2003).

57. See, e.g., *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189 (1989); *Ankenbrandt v. Richards*, 504 U.S. 689 (1992). As Elizabeth Schneider has noted, “[i]n our society, law is for business and other important things. The fact that the law in general claims to have so little bearing on women’s day-to-day concerns reflects and underscores their insignificance.” Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 978 (1991).

line of case law.<sup>58</sup> Jessica Gonzales brought a federal § 1983 action against the city of Castle Rock and its police department, claiming that her due process rights were violated when law enforcement failed to arrest her estranged husband despite her increasingly urgent reports that he was violating the terms of a domestic violence protection order.<sup>59</sup>

Gonzales' husband had taken their three daughters from the front yard of her house where they were playing early one evening.<sup>60</sup> This violated the terms of Gonzales' protection order against her husband. When she realized that her children were missing, Gonzales repeatedly called police to ask them to enforce her protection order, but the police continued to ignore her requests over several hours.<sup>61</sup> In the early hours of the following morning, Gonzales' husband arrived at the police station and opened fire with a handgun he had purchased earlier that evening. Police returned fire, killing him. The officers then looked inside his truck, where they found the bodies of all three daughters whom he had already murdered.<sup>62</sup>

The case focused on whether a person who had obtained a protection order had a constitutionally protected property interest, and therefore a claim under § 1983, in having police enforce the order when they had probable cause to believe it had been violated. The relevant Colorado statute stated: "A peace officer shall use every reasonable means to enforce a restraining order," and that

[a] peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that . . . the restrained person has violated or attempted to violate any provision of a restraining order . . . .<sup>63</sup>

The actual protection order form issued against Gonzales' husband contained a warning to respondents and a notice to law enforcement that explained the arrest requirement using the statutory language.<sup>64</sup>

Gonzales argued that both the terms of the protection order and the state statute required police to make an arrest when they had probable cause to believe that the person against whom the order was issued had violated its terms. If the person could not be located, police were required to seek a warrant for his arrest. Gonzales claimed that these requirements provided her with a property interest in the order's enforcement. By failing to do so, the Castle Rock Police Department deprived her of her procedural due process rights.<sup>65</sup>

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58. 545 U.S. 748 (2005).

59. *Id.* at 751.

60. *Id.* at 753.

61. *Id.* at 753-54.

62. *Id.* at 754.

63. *Id.* at 758-59 (citing Colo. Rev. Stat. § 18-6-803.5(3) (1999)).

64. *Id.* at 751-52.

65. *Id.* at 754-55.

The Court held, however, that no such property interest was created, and so Gonzales had no claim against the police department under § 1983.<sup>66</sup> The Court found that the state statute did not create a property interest because its language did not make arrest upon violation of a protection order compulsory. The Court seemingly ignored the plain meaning of the statute to argue that: “We do not believe that these provisions of Colorado law truly made enforcement of restraining orders *mandatory*. A well-established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.”<sup>67</sup> Therefore, “a true mandate of police action would require some stronger indication from the Colorado Legislature than ‘shall use every reasonable means to enforce a restraining order. . . .’”<sup>68</sup>

This conclusion violated the Court’s own well-settled view that the plain meaning of a statute’s text is the first and primary source of statutory interpretation.<sup>69</sup> Its interpretation was also at odds with the clear legislative intent to strengthen state laws and protections for victims of domestic violence.<sup>70</sup> The Court’s reading of the statute simply strains credulity in a manner reminiscent of state courts’ implausible interpretations of the Married Women’s Property Acts to bar women from suing their spouses.<sup>71</sup> The Court’s decision in *Castle Rock* continues the long tradition of keeping claims between family members out of court. The decision barred the use of federal civil rights claims in these matters, but it also undermined the right of a family member to seek redress for injuries by another member in the state courts. The right to a protection order loses value if there is no right to its enforcement.<sup>72</sup> *Castle Rock* exemplifies the lengths to which the Court continues to go to avoid consideration of what it perceives to be matters of family relations.

The domestic relations exception to federal jurisdiction provides another example of the way that courts have shown their disregard for family law. In cases dating back to *Barber v. Barber*,<sup>73</sup> the Supreme Court

66. *Id.* at 768.

67. *Id.* at 760.

68. *Id.* at 761.

69. *See, e.g.*, *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (noting that where there is no clearly expressed intention to the contrary, language of the statute itself is ordinarily “conclusive”); *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (“When the words of a statute are unambiguous . . . [the] ‘judicial inquiry is complete.’”) (citations omitted). For a more extensive discussion of how the majority’s explanation of the Colorado statute contradicted the theory of statutory interpretation of the opinion’s author, Justice Scalia, *see* Emily J. Sack, *The Domestic Relations Exception, Domestic Violence, and Equal Access to Federal Courts*, 84 WASH. U. L. REV. 1441, 1505-08 (2006).

70. *See* Brief of Peggy Kearns, et al. as Amici Curiae in Support of Respondent at 12, *Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278) (noting that the bill included provisions which toughened civil and criminal penalties to hold batterers accountable and deter them from committing future acts of violence).

71. *See supra* text accompanying notes 51-56.

72. *See* Brief Amicus Curiae of the American Civil Liberties Union, et al. in Support of Respondent at 21-24, *Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278).

73. 62 U.S. (21 How.) 582 (1858). The domestic relations exception can be traced to the following dicta in *Barber*: “We disclaim altogether any jurisdiction in the courts of the

has explained that the federal courts are not the proper venue for resolving family disputes, even where these matters meet the requirements for federal diversity jurisdiction. This position, however, is not simply the quaint view of nineteenth century judges. Despite the lack of a convincing rationale, the Supreme Court has continued to uphold the exception in cases involving child custody,<sup>74</sup> as well as divorce, alimony, and marital property awards.<sup>75</sup>

The demands of family justified a quite literal exclusion of women from the courts. Women could not or were not required to participate in jury service through the mid-twentieth century because they were needed at home. In the 1961 case of *Hoyt v. Florida*, the Supreme Court upheld the constitutionality of a state statute which provided that no female would be taken for jury service unless she had affirmatively registered with the clerk her desire to be called for jury duty.<sup>76</sup> Gwendolyn Hoyt was charged with killing her husband, and was convicted of murder by an all-male jury.<sup>77</sup> She challenged the jury service statute on equal protection grounds, arguing that it imposed the burden of voluntary registration upon women, but not upon men. The Florida Supreme Court rejected this claim. The absolute exclusion of women from jury service in the past was based "upon the inconsistency of such demands with their role in society."<sup>78</sup> If total exclusion of women has been held constitutional, the court reasoned, then a regulation imposed on women's eligibility for service cannot be unconstitutional.<sup>79</sup> The Court stated that:

Whatever changes may have taken place in the political or economic status of women in our society, nothing has yet altered the fact of their primary responsibility, as a class, for the daily welfare of the family unit upon which our civilization depends. The statute . . . sim-

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United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board." *Id.* at 584.

74. *In re Burrus*, 136 U.S. 586, 593-94 (1890).

75. See generally *Simms v. Simms*, 175 U.S. 162 (1899); see also *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930); *De La Rama v. De La Rama*, 201 U.S. 303, 310 (1906). The Court has based the domestic relations exception on various theories, such as the historical limitations on English chancery jurisdiction that were incorporated into the American court system and the inability of a divorce to be quantified in monetary terms, so that it fails the amount in controversy requirement of federal diversity jurisdiction. See Sack, *supra* note 69, at 1481-92 (2006). In its most recent direct pronouncement, the Court acknowledged that the exception was not constitutionally based and noted the weakness of the various rationales for its existence. *Ankenbrandt v. Richards*, 504 U.S. 689, 695 (1992). However, the Court ultimately upheld the exception, relying on Congress' long acceptance of the Court's interpretation of the Judiciary Act to exclude domestic relations cases, as well as principles of *stare decisis*. *Id.* at 700; see also Sack, *supra* note 69, at 1449-55. Jana Singer has made the point that even at the state level, the push to make custody and divorce matters the subject of mediation rather than judicial procedure also "reflects, in part, a sense that our judicial system should be reserved for matters more important than domestic conflicts." Singer, *supra* note 15, at 1562.

76. *Hoyt v. Florida*, 368 U.S. 57, 61 (1961).

77. *Hoyt v. State*, 119 So. 2d 691, 693 (Fla. 1959), *aff'd*, 368 U.S. 57 (1961).

78. *Id.* at 694.

79. *Id.*

ply recognizes that the traditional exclusion was based . . . upon the premise that such demands might place an unwarranted strain upon the social and domestic structure. . . .<sup>80</sup>

Therefore, women should have the right to decide whether jury service would risk impairing “their more vital role.”<sup>81</sup> The U.S. Supreme Court affirmed.<sup>82</sup> Because women remain “the center of home and family life,” the Court found that it was not unreasonable for a state to conclude that a woman should be relieved of jury duty unless she determines that this service “is consistent with her own special responsibilities.”<sup>83</sup>

Family relationships were barred as a subject for consideration by the courts and married women were barred as litigants. In addition, because of their obligations to their families, women were discouraged, if not outright excluded, from jury service until well into the twentieth century.<sup>84</sup> Here again, moral values and the promotion of selflessness in family relations acted to restrict women’s autonomy. If women had “special responsibilities” to their families, what would it mean if they decided to volunteer for jury service? Apparently, they selfishly would be neglecting those responsibilities while also “placing an unwarranted strain upon the social and domestic structure.”

#### B. THE INVISIBILITY OF FAMILY LAW IN FEDERAL AND CONSTITUTIONAL LAW

The Supreme Court has also made clear its view that family law is fundamentally unimportant to federal legislation or constitutional adjudication. For example, in determining the scope of congressional authority under the Commerce Clause in *United States v. Lopez*, the Court expressed the fear that, without limits, Congress could go so far as to make family law.<sup>85</sup> Intimate family activities could be connected to interstate commerce: “Under the dissent’s rationale, Congress could just as easily look at child rearing as ‘fall[ing] on the commercial side of the line’ because it provides ‘a valuable service—namely, to equip [children] with the skills they need to survive in life and, more specifically, in the workplace.’”<sup>86</sup> To the Court, the idea that child rearing could be a matter of federal legislation was so apparently ludicrous it proved the point that without boundaries in its Commerce Clause power, Congress could wander into totally inappropriate territory.<sup>87</sup> The dissent agreed that

80. *Id.*

81. *Id.* This “privilege” was distinct from a blanket exclusion of women based on alleged hardship. *Id.*

82. *Hoyt v. Florida*, 368 U.S. 57, 61 (1961).

83. *Id.* at 62. The Court noted that this reasoning may not apply to women without family responsibilities but concluded that it was not irrational for a legislature to prefer the broad exemption of all women rather than having to make individual decisions. *Id.* at 63.

84. *Hoyt* was effectively overruled by the Court in 1975. See *Taylor v. Louisiana*, 419 U.S. 522 (1975).

85. 514 U.S. 549, 565 (1995).

86. *Id.* (alteration in original).

87. See Sack, *supra* note 69, at 1496.



“marriage, divorce, and child custody” were areas that were beyond Congress’ authority.<sup>88</sup>

Even a superficial review of federal legislation for the past thirty years reveals that, in fact, Congress has devoted substantial energy to family law issues, including child welfare, custody, and child support.<sup>89</sup> Congress also has been involved in the regulation of marriage, both directly and indirectly.<sup>90</sup> In this context, the *Lopez* Court’s dismissal of family law as a subject for federal legislation is startling.<sup>91</sup> Apparently, federal family law was invisible to the Court.

The treatment of the civil rights provision of the Violence Against Women Act,<sup>92</sup> both during the drafting of the legislation in Congress and at the Supreme Court in *United States v. Morrison*,<sup>93</sup> highlights the fear that federal courts will be responsible for any family law issues.<sup>94</sup> As part of comprehensive legislation to address domestic violence, the civil rights provision created a private cause of action against any person who committed a “crime of violence motivated by gender” and allowed any person

88. *Lopez*, 514 U.S. at 624 (Breyer, J., dissenting).

89. See, e.g., Child Abuse Prevention and Treatment and Adoption Reform Opportunities Act of 1978, Pub. L. No. 95-266 (codified at 42 U.S.C. §§ 701-709); Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended at 42 U.S.C. § 670 *et seq.*); Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3569 (codified at 28 U.S.C. § 1738A); Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403 (1992) (codified at 18 U.S.C. § 228); Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-2654); Newborns’ and Mothers’ Health Protection Act of 1996, Pub. L. No. 104-204, tit. VI, 110 Stat. 2935, 2936 (codified at 29 U.S.C. § 1185); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103(a)(1), 110 Stat. 2105, 2129 (codified at 42 U.S.C. § 607(e)(2), (g)); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. §§ 5101-07); Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618 (codified at 18 U.S.C. § 228). See also Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1373-85 (1998) (cataloguing areas of federal legislation involving family law); Laura W. Morgan, *The Federalization of Child Support—A Shift in the Ruling Paradigm: Child Support as Outside the Contours of “Family Law,”* 16 J. AM. ACAD. MATRIMONIAL LAW 195, 210-11 (1999).

90. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C). Congress has also considered a Federal Marriage Amendment to the Constitution as recently as the summer of 2006.

91. See Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 870-71 (2004) (arguing that in the traditional family law canon, family law is not a part of federal law, which allows opponents of a specific federal family law to argue that it cannot be permitted simply because “any form of federal family law is unprecedented and inappropriate”).

92. Violence Against Women Act of 1994, Pub. L. No. 103-22, 108 Stat. 1902-55 (codified in scattered sections of 18, 28, and 42 U.S.C.). The civil rights provision was codified at 42 U.S.C. § 13981(c) (1994), *invalidated* by *United States v. Morrison*, 529 U.S. 598 (2000).

93. 529 U.S. 598 (2000).

94. For more comprehensive discussions of the civil rights provision and *Morrison*, see generally Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57 (2002); Julie Goldscheid, *Advancing Equality in Domestic Violence Law Reform*, 11 AM. U. J. GENDER SOC. POL’Y & L. 417 (2003); Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135 (2000); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001).

injured by such a crime to obtain compensatory damages, punitive damages, and any injunctive, declaratory, or other appropriate relief.<sup>95</sup> Though no intimate or family relationship between the parties was required to bring an action under the provision, from the start of its drafting there was concern that plaintiffs would be able to join family law claims such as divorce to the civil rights action, thereby allowing family law matters into federal court.<sup>96</sup> Chief Justice Rehnquist and an ad hoc committee of the Judicial Conference of the United States weighed in with the concern that the provision could involve federal courts in a panoply of “domestic relations disputes.”<sup>97</sup> The final version of the legislation explicitly prohibited the joining of divorce, alimony, marital property, or child custody claims to any case brought under the civil rights provision.<sup>98</sup>

Though potential family law matters had been excised from the provision, they resurfaced as a focus of the Supreme Court’s concern in *United States v. Morrison*.<sup>99</sup> And, though there was no intimate or family relationship element in the cause of action and the case at issue involved a stranger rape, the Court persisted in treating the civil rights provision as a species of family law.<sup>100</sup> As such, it was not within the scope of federal law.<sup>101</sup> Repeating the concern it voiced in *Lopez*, the Court stated that without limits on congressional power under the Commerce Clause, there would be no barrier to federal legislation in areas of clear local concern, such as family law, “since the aggregate effect of marriage, divorce and

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95. § 13981(c).

96. See Judith Resnik, *Reconstructing Equality: of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. & FEMINISM 393, 402 & n.39 (2002).

97. See REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON GENDER-BASED VIOLENCE 1 (1991); William H. Rehnquist, *Chief Justice’s 1991 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH, Jan. 1992, at 3. Chief Justice Rehnquist had made clear his concern about federal court involvement in domestic relations cases well before this statement. In his dissent in *Santosky v. Kramer*, 455 U.S. 745 (1982), a case which held that due process required a standard of at least clear and convincing evidence in a state termination of parental rights proceeding, then-Justice Rehnquist argued against imposing a federal standard on state family law: “if ever there were an area in which federal courts should heed the admonition of Justice Holmes that ‘a page of history is worth of volume of logic,’ it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good reason.” *Id.* at 770 (Rehnquist, J., dissenting) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)). See Hasday, *supra* note 89, at 1305-06.

98. § 13981 (e)(4) (“Neither section 1367 of title 28 nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree”).

99. 529 U.S. 598 (2000).

100. The Court, noting that family law could not be the basis for congressional authority under the Commerce Clause, stated: “Congress may have recognized this specter when it expressly precluded § 13981 from being used in a family law context. Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.” *Id.* at 616. Despite efforts to distance the legislation from family law, according to the Court, Congress had not succeeded.

101. As the Court famously put it, “[t]he Constitution requires a distinction between what is truly national and what is truly local.” *Id.* at 617-18.

childbearing on the national economy is undoubtedly significant."<sup>102</sup> The provision was therefore beyond Congress' authority under the Commerce Clause and, thus, unconstitutional.<sup>103</sup>

The Court failed to recognize the extensive federal legislation that exists on family matters, and found that anything it characterized as family law (whether it actually involved families or not) could not be within federal jurisdiction. The concept that family law can be a focus of federal, and therefore national, attention seemed unfathomable to the Court.

Ironically, one piece of federal legislation involving family matters that the Court was happy to consider and uphold was the Partial-Birth Abortion Ban Act of 2003.<sup>104</sup> The statute refers to "[a]ny physician who, in or affecting interstate or foreign commerce," so that Congress apparently relied on its Commerce Clause authority.<sup>105</sup> The *Gonzales* majority assumed this in passing, but did not discuss Congress's power to enact such a law.<sup>106</sup> Only Justice Thomas, in a concurring opinion joined by Justice Scalia, raised the issue and noted that it was not before the Court.<sup>107</sup> When discussing abortion rights, the Court accepted Congress's characterization of the law as involving regulation of physicians and not family decision-making. Even in this depiction, however, it seems clear that the doctors' medical practice and the performance of the abortion procedure were "local," rather than in or affecting interstate commerce. While the abortion procedure in question concerned issues of reproduction and decisions on child-rearing which are central to family law, the Court did not label this legislation as family law, though it certainly was more closely related to family issues than the civil rights provision struck down in *Morrison*. One explanation may be that unlike *Morrison*, *Gonzales* concerned the constitutional right to privacy which, as we will see in the next section, has been severed from family law.

### C. FAMILY LAW'S REJECTION OF THE CONSTITUTIONAL RIGHT TO PRIVACY

Family law is invisible in federal law in another sense. Though it can be argued that the leading developments in modern constitutional law have been in the area of family law, the line of substantive due process and equal protection cases involving the right to privacy, including *Gris-*

102. *Id.* at 615-16.

103. *Id.* at 617. The Court also found that Congress lacked authority to enact the provision under Section 5 of the 14th Amendment. *Id.* at 627.

104. 18 U.S.C. § 1531 (upheld in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007)); see *supra* text accompanying notes 14-33.

105. 18 U.S.C. § 1531(a) (Supp. II 2003).

106. *Gonzales*, 127 S. Ct. at 1638.

107. *Id.* at 1640 (Thomas, J. concurring) ("I also note that whether the Act constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it.").

wold,<sup>108</sup> *Eisenstadt*,<sup>109</sup> *Loving*,<sup>110</sup> and *Roe*,<sup>111</sup> are rarely characterized as family law cases.<sup>112</sup>

The tension between the constitutional right to privacy cases and family law has its roots in the conception of the family as a mutually dependent and supportive entity in which individual rights must be sublimated.<sup>113</sup> Critics of individualism as an important element of the modern family point to the constitutional right to privacy jurisprudence as a demonstration of the havoc in family structure created by a concentration on individual rights. The Supreme Court's recognition of access to contraception regardless of marital status,<sup>114</sup> access to abortion by a woman without her husband's consent or notification,<sup>115</sup> and the ability of a minor to obtain an abortion without parental consent,<sup>116</sup> all focus on individuals and their rights, rather than on their status as members of a family, with the relationships and obligations that status requires.<sup>117</sup> In addition, the constitutional decisions seem to support "a more general right of autonomy in sexual conduct, which would reflect displacement of marital status as the basis of distinctive sexual rights."<sup>118</sup>

Conversely, advocates for women's rights have been wary of the concept of privacy as it relates to the family, for good reason. The traditional view of family privacy derives from a vision of society as divided into separate spheres: the "public" world of the state and the market and the "private" world of the family. This private sphere functioned as a domestic sanctuary, offering comfort and support, to which women were confined and in which men could be nurtured to compete in the public sphere.<sup>119</sup> Though the domestic sphere was the domain of women, it was

108. 381 U.S. 479 (1965) (holding that right of married couples to use contraception is protected under the Constitution).

109. 405 U.S. 438 (1972) (holding that a statute that denied single people access to contraception while permitting married people to do so violated the Equal Protection Clause).

110. 388 U.S. 1 (1967) (holding anti-miscegenation statute unconstitutional).

111. 410 U.S. 113 (1973) (holding that the right to choose abortion is a fundamental right protected under the Due Process Clause).

112. While family law textbooks and courses routinely cover significant areas of constitutional law, to the "outside world" of law practitioners and law school colleagues, family law denotes a narrow field of the common and statutory law of divorce, custody, and property division. Jill Hasday argues that family law is often treated as though it cannot operate within another body of law at the same time. See Hasday, *supra* note 91, at 872. Therefore the line of cases starting from *Griswold* may fall into constitutional legal categories like substantive due process or equal protection, but they are family law decisions, too. *Id.* at 882.

113. See *supra* text accompanying notes 6-8, 14-18.

114. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

115. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887- 898 (1992).

116. *Bellotti v. Baird*, 443 U.S. 622 (1979); *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

117. REGAN, *supra* note 6, at 39-40.

118. *Id.* at 40. Though Milton Regan was writing before *Lawrence v. Texas*, presumably he would see that decision as further recognition by the Court of individual sexual autonomy, whether inside or outside of marriage.

119. *Id.* at 21-25. While disavowing the gender inequities of the traditional "private sphere," Regan argues that the family may benefit from a return to the concept of "status,"

controlled by men who alone were able to enter the public sphere. Coverture ensured that married women had no independent access to the public world, and the state would not interfere in this private sphere, thereby offering no legal recourse for these women to redress inequities.<sup>120</sup> This meant that the power held by husbands and fathers over women and the inability of married women to have any legal or public identity was not disturbed.<sup>121</sup> It was this view of the family as a separate sphere that rationalized the state's failure to intervene in domestic violence.<sup>122</sup> The legacy of this view, which justified non-intervention by the state and left women alone in hierarchical, and often violent, family relationships, demonstrates the continuing "dark and violent side of privacy."<sup>123</sup> Therefore, scholars and advocates concerned with women's rights have been dubious about linking the concept of privacy to family.<sup>124</sup>

However, the constitutional right to privacy, as it has developed to include individual autonomy, is far different from the traditional conception of family privacy.<sup>125</sup> While the recognition of constitutional privacy rights benefits individuals beyond their role in the traditional family, it also can promote the rights and equality of individuals within families. Moreover, the broadening of the constitutional right to privacy can also broaden the definition of family. Therefore, a focus on constitutional rights to individual autonomy and privacy has much to offer family law.

Both the supporters of the selfless family and women's advocates concerned about the harms of privacy, however, have placed family law at odds with the development of the constitutional right to privacy. In turn, the development of constitutional jurisprudence is conceived as separate from the family and family law. Scholars preoccupied with the current

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in which family members are subject to clear expectations and duties, in contrast to the modern atomistic view of the family as a collection of individuals guided only by personal desire and fulfillment. *Id.* at 9-13, 30-33, 89-117.

120. Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 328, 331-32 (3d ed. 1988); see also Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497, 1505-06, 1521-22 (1983).

121. Taub & Schneider, *supra* note 120, at 328.

122. Schneider, *supra* note 57, at 984-85 ("The concept of privacy encourages, reinforces, and supports violence against women . . . Privacy operates as a mask for inequality, protecting male violence against women."). See generally CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

123. See Schneider, *supra* note 57, at 974-75, 998 (noting that the challenge is developing a right to privacy as an aspect of autonomy, distinct from the traditional doctrine of state nonintervention).

124. Scholars have argued that due to the oppression associated with privacy, the right to privacy is too limiting a constitutional basis for promoting women's autonomy, such as the right to reproductive choice. See, e.g., Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 *U. PA. L. REV.* 955, 1020-21 (1984); Schneider, *supra* note 57, at 997-98.

125. The right to privacy in constitutional law quickly expanded from its focus on the family as a unit, see e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965), to individuals, either within or outside the family. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Lawrence v. Texas*, 539 U.S. 558 (2003). See also Schneider, *supra* note 57, at 995-96; Singer, *supra* note 15, at 1510-11.

debates in family law have failed to embrace individual autonomy as part of family relationships and failed to focus on the reality that family members are also individuals. Therefore, they have missed the opportunity to incorporate the benefits of privacy into family law. In so doing, they have rendered family law irrelevant in the central battleground for the constitutional privacy rights. As the next section demonstrates, on a more practical level, this separation of family law from constitutional law also has had an important impact on the value placed on family law in the academy.

#### D. FAMILY LAW IN LAW SCHOOLS: LIFE IN THE GHETTO

The treatment of family law in the legal academy replicates and assists in perpetuating its isolation by the court system. Again, the regard with which family law is held is integrally related to the legal system's view of women. In law schools, the devaluing and separation of family law is exemplified by its identification as a "female" subject taught overwhelmingly by female law professors. Moreover, the conceptual separation of constitutional law from family law reinforces the lack of prestige awarded to family law. Despite the central role of family law in legal practice and the focus on family and intimate relationships in developing constitutional law, the teaching of family law is an afterthought in the legal academy.<sup>126</sup>

In her recent study of female law professors and the courses they teach, Professor Marjorie Kornhauser reaches the disturbing conclusion that, as the number and proportion of female law professors has increased, there has been an accompanying growth in segregation by gender of courses taught.<sup>127</sup> Moreover, the courses which have become increasingly and most strongly identified as "female" are those which hold lower status in law schools.<sup>128</sup> Family law is one area in which there is a significant over-

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126. See Nicholas Bala, *There Are Some Elephants in the Room: Being Realistic About Law Students, Law Schools, and the Legal Profession When Thinking About Family Law Education*, 44 *FAM. CT. REV.* 577, 580 (2006) ("The reality has been that, within law schools in North America, family law has been low in the hierarchy of subjects for specializations and has received a disproportionately small amount of attention compared to the number of practitioners in this area, its volume of cases in the court system, and its importance for society. At many law schools, there are no or few advanced family law offerings, and clinical and internship programs in family law are not common.").

127. Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 *UMKC L. REV.* 293, 295 (2004). Kornhauser studied the gender distribution of law professors by courses taught from the 1990-1991 year to the 2002-2003 year. *Id.* at 296.

128. *Id.* at 295. Kornhauser posits that some courses can be classified as either "male" or "female" courses, defined as courses thought to exhibit traits generally associated with traditional gender categories. *Id.* at 306. She defines a "male" course as having one or more of these traits: it covers what the academy considers a core legal subject such as Evidence or Corporations; it is a traditionally prestigious area of the law within law schools, such as Constitutional Law; and it is a prestigious area of law practice because it has high status clients, high fees, high intellectual content, or involves a lot of scientific or regulatory work, such as Intellectual property, Corporate Finance, Federal Taxation or Antitrust. *Id.* at 307. Conversely, a "female" course has one or more of the following characteristics: it is a topic traditionally of interest to women, and which involves personal relationships, such as Fam-

concentration of female law professors.<sup>129</sup> This over-concentration in family law has increased absolutely, so that even as the proportion of law professors that are women has grown, so has the gender distortion.<sup>130</sup> Kornhauser notes that in 1990-1991, Family Law ranked as the course with the third highest absolute female disparity, lower only than Women and the Law and Juvenile Law.<sup>131</sup> In 2002-2003, Family Law had moved up to the course with the second highest absolute female disparity, ranking lower only than Women and the Law.<sup>132</sup>

Though the over-concentration of women law professors in courses such as Family Law no doubt has several explanations, one hypothesis proposed by Kornhauser has resonance: "the increased percentage of women law professors allows male professors to leave less prestigious courses to females."<sup>133</sup> In other words, in the past, someone had to teach family law courses, and since there were so few female law professors, that person was usually a man. As more women entered the legal academy however, male professors were able to move on and leave the lower status courses to the women.

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ily Law or Juvenile Law; it is considered "softer" law, such as Poverty Law, as compared to traditionally more doctrinal or hard core subjects such as Contracts, Conflicts, or Federal Courts; it is a traditionally less prestigious area of the law within law schools, such as Legal Writing or Clinical Law; or it is a less prestigious area of law practice, such as Immigration Law. *Id.* See Elizabeth Basile, *False Starts: Harvard Law School's Efforts Toward Integrating Women into the Faculty, 1928-1981*, 28 HARV. J. L. & GENDER 143, 180 n.280 (2005) (discussing an interview with Professor Tamar Frankel, who noted that tax and securities law were considered "male law subjects," as compared to areas traditionally taught and practiced by women, such as Trusts and Estates and Family Law).

129. Kornhauser, *supra* note 127, at 302 (noting that in 2002-2003, the percentage of law professors that were women was 31.8%; however, the percentage of women law professors teaching Family Law was 58.8%). Other studies also have noted the overconcentration of female professors teaching family law courses. See, e.g., Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 258-59, 264-65 (1997) (observing that in a study of professors who began tenure-track appointments at law schools between Fall 1986 and Spring 1991, after controlling for variables such as credentials and experience, white women were significantly more likely than white men, men of color, and women of color to teach Family Law, and the proportion of women of color teaching Family Law was higher than the proportion of both white men and men of color who did so).

130. Kornhauser, *supra* note 127, at 329 app. 1. In 1990-1991, the percentage of law professors that were women was 21.7% and the percentage of women law professors that were teaching Family Law was 41.0%. In 2002-2003, the percentage of law professors that were women was 31.8%, while the percentage of women law professors that were teaching Family Law was 58.8%. Thus, the gender distortion grew from 19.3% in 1990-1991, to 27.0% in 2002-2003. *Id.* In the very early days of women law professors, their numbers were so few, and their concentration in certain subject areas was so high, that the gender distortion was even greater than in recent times. See Donna Fossum, *Women Law Professors*, 1980 AM. B. FOUND. RES. J. 903, 905.

131. Kornhauser, *supra* note 127, at 334 tbl. 1A.

132. *Id.* at 337 tbl. 2A.

133. *Id.* at 312. Kornhauser proffers other explanations as well, such as response to "stereotype threat," where a stereotyped person underperforms when she undertakes a non-stereotyped activity, because she believes that her performance will confirm the negative expectations that others have of her. Members of stereotyped groups often avoid situations where they feel the threat so as not to endanger their self-esteem. *Id.* at 322-24.

Many scholars have noted that new female law professors are often steered or assigned to teach what administrators think of as “female” subjects.<sup>134</sup> Conversely, mentors to women law professors often urged them to avoid being tainted by association with these areas. Judith Resnik has quoted such advice that she was given early in her teaching career by one colleague: “Be careful. Don’t teach in any areas associated with women’s issues. Don’t teach family law; don’t teach sex discrimination. Teach the real stuff, the hard stuff: contracts, torts, procedure, property.”<sup>135</sup>

This gender disparity in courses taught can have a downward spiral. While family law may already have been viewed as a low status area, the predominance of female law professors in this area itself further lowers its status.<sup>136</sup> The fact that women are “more likely to teach Family Law than Anti-trust or Constitutional Law, further buttresses the belief that women faculty are second-class faculty.”<sup>137</sup> And as long as women disproportionately teach what are considered “peripheral” courses, they will

134. See, e.g., Deborah Jones Merritt, *Are Women Stuck on the Academic Ladder? An Empirical Perspective*, 10 UCLA WOMEN’S L. J. 241, 244-45 (2000) (observing that in a comparative study of women and men entering law school teaching in the late 1980s and followed through the 1990s, men were significantly more likely to teach Constitutional Law, while women were significantly more likely to teach Trusts and Estates or skills courses; “[e]ven when a woman looks just like a man—on paper anyway—she is hired at a lower rank and assigned to teach less prestigious courses”); Kornhauser, *supra* note 127, at 324 (hypothesizing that women may feel “steered,” often unconsciously, to traditionally feminine courses by administrators, peers, or mentors); cf. Basile, *supra* note 128, at 183-84 (2005) (reporting that in 1979, when Martha Field was offered a tenured position at Harvard, “Dean Sacks assured Professor Field that she would continue to teach Federal Courts and Constitutional Law and would not be shuffled into the courses most often taught by women, such as Trusts and Estates, Family Law, and Women and the Law”).

135. Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2195 (1993). Resnik notes that this type of advice is not an historical artifact, but that she has repeatedly heard from women law professors about similar warnings they received. *Id.* In discussing the evaluation of women law professors for tenure, Marina Angel has argued that “[w]omen’s writing on women’s subjects is often considered insubstantial and unworthy. Women writing in the traditional areas for women, such as family law and juvenile law, are dealing in ‘soft areas’ which are thought to be unworthy of serious consideration.” Marina Angel, *Women in Legal Education: What It’s Like to be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799, 833 (1988).

136. See Bala, *supra* note 126, at 581 (noting that family law has traditionally been an area in which large numbers of women practice, and advanced family law courses in law school tend to have relatively large numbers of female students, which may be “subtly related to the low status of family law within the legal academy”); Michael Ariens, *The Politics of Law (Teaching)*, 13 LAW & SOC. INQUIRY 773, 777 (1988) (reviewing MICHAEL LEVIN, *THE SOCRATIC METHOD* (1987)) (“If a female law professor teaches and a female student studies family law, sex discrimination, or trusts, wills and estates, those courses might be viewed as unimportant compared with courses in the “important” corporate area.”); Kornhauser, *supra* note 127, at 325-36.

137. Kornhauser, *supra* note 127, at 326; see also Margaret V. Sachs, *Women in Corporate Law Teaching: A Tale of Two Generations*, 65 MD. L. REV. 666, 689 (2006) (noting that many of the women who became law professors between 1968 and 1978 and who taught corporate law believed that entering this field had “strategic value” because they demonstrated “their ability to handle a demanding and technical subject and thereby their entitlement to be taken seriously. They show they do precisely what their smart male colleagues do.”). Sachs adds that the flip-side of this was the “imperative of steering clear of traditional ‘female’ subjects such as family law and trusts and estates,” and that several of these professors had mentors who explicitly told them to avoid these areas. *Id.*



“remain at the margins” of the legal academy.<sup>138</sup>

Of course, this gender disparity also impacts the development of the law and the status of areas such as family law in the legal system.<sup>139</sup> If the trend Kornhauser identified continues, family law teaching will become more gender-segregated, leading to even greater isolation. Therefore, the marginalization of family law by both the legal academy and the courts does not seem destined to end anytime soon.

Our legal institutions are not taking family law seriously, which often means that they are not taking women seriously. It does not seem that we can count on critical issues of intimate relationships and family structures to be treated with any real understanding or reference to family law principles. Despite the apparent prominence of the family in current debates, I fear that these issues may be discussed and decided without the insight or influence of family law and without concern for women in and out of families.

## CONCLUSION

Over the past several years, family law scholars have explored the decline of the traditional family structure and have debated how a more modern conception of familial relationships should be constructed. However, by attacking a perceived growth in the autonomy of individual family members or minimizing the importance of this autonomy, and by separating the family from developments in the constitutional right to privacy, we have allowed the legal system to continue on its traditional path of ignoring family law and restricting the rights of women. And, by insisting on the continued value of morality as a foundation for familial relationships, family law scholars have allowed the courts and legislatures to justify these restrictions on moral grounds. Further, while these debates have raged, its participants seem not to recognize that family law continues to be marginalized and disregarded when the decisions are made.

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138. Kornhauser, *supra* note 127, at 328; Melissa Cole, *Struggling to Enjoy Ourselves or Enjoying the Struggle? One Perspective from the Newest Generation of Women Law Professors*, 10 UCLA WOMEN'S L.J. 321, 337-38 (2000) (the hiring of women law professors has been seen as an alternative to the tradition, rather than a change of the tradition: “[i]n accepting the separate space that has been allotted to us as women, however, we also implicitly accept our position at the periphery of an unchanging core”). See Angel, *supra* note 135, at 833 (noting the contrast between the low esteem in which family law is held in the legal academy and the fact that it is “perhaps the most explosive, changing, and important area of the law today”); Bala, *supra* note 126, at 580 (observing that given the numbers of family law court cases and the importance of family law issues to society, one might expect that a significant number of law schools would have selected family law as one of their areas of specialization, but that this has not occurred).

139. See Kornhauser, *supra* note 127, at 325-36. For an older article making the same point, see Elyce Zenoff & Kathryn V. Lorio, *What We Know, What We Think We Know, and What We Don't Know About Women Law Professors*, 25 ARIZ. L. REV. 869, 903 (1983) (citing a 1977 American Bar Foundation study which found that securities, tax, and anti-trust were considered the most prestigious areas of legal practice by the legal profession with “the lowest prestige rating given to family law problems of indigent clients”).

Unless we confront the weaknesses in our own conceptions of this area of the law and attack its treatment by the legal system, family law, together with women's rights, will be buried for good.



# **Casenotes**

