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Beyond Individual Privacy: A New Theory of Family Rights

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BEYOND INDIVIDUAL PRIVACY: A NEW THEORY OF FAMILY RIGHTS

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I. INTRODUCTION

Over the last twenty years, American family law has changed dramatically. We have seen the advent of no-fault divorce,[1] legalized

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1. In 1970, California adopted the first no-fault divorce statute in the United States. CAL. CIV. CODE § 4507 (West 1987). By 1986, all 50 states allowed divorce on the basis of irreconcilable differences, or similar no-fault grounds. *See* ALA. CODE § 30-2-1 (1983) ("irretrievable breakdown"); ALASKA STAT. § 25.24.200 (1983) ("irremediable breakdown"); ARIZ. REV. STAT. ANN. § 25-312 (1976 & Supp. 1986) ("irretrievably broken"); ARK. STAT. ANN. § 34-1202 (Supp. 1985) ("separate and apart"); CAL. CIV. CODE § 4507 (West 1987) ("irreconcilable differences"); COL. REV. STAT. § 14-10-110 (1973) ("irretrievably broken"); CONN. GEN. STAT. ANN. § 466-40 (West 1986) ("broken down irretrievably"); DEL. CODE ANN. tit. 13, § 1505 (1981) ("irretrievably broken"); FLA. STAT. § 61.052 (1985) ("irretrievably broken"); GA. CODE ANN. § 30-102 (Harrison 1980 & Supp. 1986) ("irretrievably broken"); HAW. REV. STAT. § 580-41 (1985) ("irretrievably broken"); IDAHO CODE § 32-603(8) (1983) ("irreconcilable differences"); ILL. ANN. STAT. ch. 40, ¶ 401(2) (Smith-Hurd Supp. 1987) ("irreconcilable differences"); IND. CODE ANN. § 31-1-11.5-3 (Burns 1980 & Supp. 1986) ("irretrievable breakdown"); IOWA CODE ANN. § 598.5 (West 1981) ("breakdown to extent no reasonable likelihood marriage can be preserved"); KAN. STAT. ANN. § 60-1601(a) (1983) ("incompatability"); KY. REV. STAT. ANN. § 403.170 (Baldwin 1986) ("irretrievably broken"); LA. REV. STAT. ANN. § 9:301 (West Supp. 1987) (one year's separation); ME. REV. STAT. ANN. tit. 19, § 691 (1981) ("irreconcilable differences"); MD. FAMILY LAW CODE ANN. § 7-103 (1984) (one year's separation and no reasonable expectation of reconciliation); MASS. GEN. L. ch. 208, § 1 (1975) ("irretrievable breakdown"); MICH. COMP. LAWS § 552.6 (Supp. 1987) ("objects of matrimony . . . destroyed"); MINN. STAT. ANN. § 518.06 (West Supp. 1987) ("irretrievable breakdown"); MISS. CODE ANN. § 93-5-2 (Supp. 1986) ("irreconcilable differences"); MO. ANN. STAT. §§ 452.305(2), .320 (Vernon 1986) ("irretrievably broken"); MONT. CODE ANN. § 40-4-107 (1985) ("irretrievable breakdown"); NEB. REV. STAT. § 42-347 (1984) ("irretrievably broken"); NEV. REV. STAT. § 125.010 (1983) ("incompatability"); N.H. REV. STAT. ANN. § 458.7-a (1983) ("irreconcilable differences"); N.J. STAT. ANN. § 2A:34-2d (West Supp. 1987) (18 months' separation and no reasonable prospect of reconciliation); N.M. STAT. ANN. § 40-4-2 (1978) ("incompatability"); N.Y. DOM. REL. LAW § 170(6) (McKinney 1977) (one year's separation); N.C. GEN. STAT. § 50-6 (1984) (one year's separation); N.D. CENT. CODE §§ 14-05-03, 14-05-09.1 (1981) ("irreconcilable differences"); OHIO REV. CODE ANN. § 3105-01(k) (Anderson 1980) (one year's separation); OKLA. STAT. ANN. tit. 12, § 1271

contraception[2] and abortion,[3] child custody rights for unwed fathers,[4] palimony,[5] restrictions on marital testimonial privileges,[6] and expansion of child abuse and neglect provisions.[7] These changes signal a basic shift in the way society and the courts view the family. Thus, we have rejected an established paradigm, but not yet articulated a new one.[8]

The old paradigm was paternalistic and family oriented. The family was viewed as an inherently valuable institution that was the source of all strength and morality in the American character.[9] This idealized family needed protection from outside influences that might weaken it. Hence, divorce was discouraged,[10] contraception[11] and abortion[12] were prohibited, and conflicts between individual and family were usually resolved in favor of the family.[13]

We have documented the shift away from paternalism,[14] but not yet articulated a new paradigm to explain the changes. We must

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(West 1961) ("incompatability"); OR. REV. STAT. § 107.025 (1983) ("irreconcilable differences"); 23 PA. CONS. STAT. ANN. § 201(d) (Purdon Supp. 1987) ("irretrievably broken"); R.I. GEN. LAWS § 15-5-3 (Supp. 1986) (three years' separation); S.C. CODE ANN. § 20-3-10 (Law Co-op. 1976) (one year's separation); S.D. CODIFIED LAWS ANN. § 25-4-2 (Supp. 1987) ("irreconcilable differences"); TENN. CODE ANN. § 36-4-103 (1984) ("irreconcilable differences"); TEX. FAMILY CODE ANN. § 3.01 (Vernon 1975) (destruction of the "legitimate ends of the marriage"); UTAH CODE ANN. § 30-3-1(3)(h) (Supp. 1987) ("irreconcilable differences"); VT. STAT. ANN. tit. 15, § 551(7) (1974) (six months' separation and "resumption of marital relations is not reasonably probable"); VA. CODE ANN. § 20-91(9)(a) (1950 & Supp. 1987) (six months' separation when no minor children); WASH. REV. CODE ANN. § 26.09.030 (1986) ("irretrievably broken"); W. VA. CODE § 48-2-4(10) (1986) ("irreconcilable differences"); WIS. STAT. ANN. § 767.12(2)(a) (West 1981) ("irretrievably broken"); WYO. STAT. § 20-2-104 (1987) ("irreconcilable differences").

2. Griswold v. Connecticut, 381 U.S. 479 (1965).

3. Roe v. Wade, 410 U.S. 113 (1973).

4. Stanley v. Illinois, 405 U.S. 645 (1972).

5. Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (en banc).

6. Trammel v. United States, 445 U.S. 40 (1980).

7. *E.g.*, 42 U.S.C. §§ 701-709 (1982).

8. Kuhn argues that ideas change in a set sequence. The community begins with a paradigm that articulates the basic premises in a given field. Scholars then keep refining that paradigm. Eventually, these refinements become criticisms that erode the underlying paradigm. As a result, a new paradigm emerges. T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1970).

9. M. GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 3 (1985).

10. *See* Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 653 (1984).

11. *E.g.*, CONN. GEN. STAT. § 53-32 (1958) (repealed 1969).

12. *E.g.*, ILL. REV. STAT. ch. 38, § 3 (1867) (repealed 1961).

13. M. GROSSBERG, *supra* note 9, at 29.

14. M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981); Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

establish a new paradigm for three reasons. First, we need to explain coherently the changes that have occurred. Second, we need to predict how courts may rule in the future. Finally, we need to set priorities that will help us decide difficult issues as they arise.

Section II of this article describes the pro-family paradigm that stressed family unity. In applying the paradigm, courts relied heavily on notions of privacy when such notions supported family goals, but courts disregarded privacy considerations that countered the avid pro-natalism and paternalism inherent in the pro-family view. The pro-family view categorized a legally married couple and their legitimate children as good, and condemned illegitimates and other non-traditional families as bad.

Section III describes the shift to individualism, which was largely accomplished by creating a new constitutional right of privacy, embodied in a line of decisions supporting procreative choice. When the new right of privacy conflicted with individualism, however, individualism still prevailed, in much the same way pro-family views had previously prevailed. The new emphasis on individuals reflected a new vision of strong independent women. As a result, good and bad families were redefined, with homosexuals and members of the underclass falling into the bad category.

Section IV discusses the two major problems associated with the dichotomy between the family and the individual: intolerance for heterogeneity, and unnecessary conflicts between the family and its individual members.

Section V considers the nature of rights in general, and the problems of defining the fundamental right of privacy, as well as balancing that right against other rights. Section V proposes a new theory of family rights suggesting that fundamental family rights belong both to the family as a group and to each family member individually; and that when competing rights need to be accommodated, we should give priority to the objectively weaker party. The theory deals with family rights both in the vertical context, in protecting the family and its individuals from the government; and in the horizontal context, in allocating rights between competing family members. The theory in the vertical context is illustrated with a discussion of the spousal testimonial privilege and the parent/child testimonial privilege. The theory in the horizontal context is then applied to allocate child custody rights and alimony.

Finally, section VI discusses some of the limits on the theory of family rights and some avenues for further research. The limitations analyzed, however, do not undermine the theory's validity. Rather, the analysis recognizes that refining the theory can only be accomplished by attempting to answer difficult questions.

II. The Family Paradigm

A. *Family Unity*

Our search for a new paradigm must begin with an examination of the old one. Traditionally, the family unit was highly valued as the central building block of society. As Judge Traynor so eloquently expressed it: "The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life . . . . Since the family is the core of our society, the law seeks to foster and preserve marriage."[15]

The inherent value placed on family unity meant that courts were reluctant to intervene in family affairs on behalf of individuals. As a result, society tolerated a great deal of abuse so long as the family unit remained intact. Thus, in *State v. Rhodes*,[16] an early wife beating case, the court criticized the husband for his conduct, but refused any remedy. The court considered the wife's temporary pain from the husband's beatings less evil than publicizing the private affairs of the marital home.[17]

B. *The Role of Privacy*

Family privacy became a shield behind which abusive husbands could hide. A man's home was his castle. Except in the most egregious circumstances, a court would not inquire as to what went on behind the castle doors. Non-intervention was intended to protect family unity, rather than any particular family member.

This tradition of non-intervention is an ancient one. Since the Middle Ages, courts have been reluctant to interfere in family matters. Thus, as early as 1628, Coke noted that a wife could not testify against her husband.[18]

Schneider has suggested two basic reasons for the historical opposition to government intervention in the family.[19] First, courts had traditionally perceived intervention as ineffective. Because the spouse or child to be protected frequently depended on the transgressor, intervention could cause the transgressor to retaliate or withdraw support. Second, the specter of "Big Brother"[20] was ever present.

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15. DeBurgh v. DeBurgh, 39 Cal. 2d 858, 863-64, 250 P.2d 598, 601 (1952) (en banc).
16. 62 N.C. (Phil. Law) 453 (1868).
17. *Id.* at 456-57.
18. E. Coke, A Commentarie Upon Littleton *6b.
19. Schneider, *supra* note 14, at 1837-38.
20. G. Orwell, 1984 (1949).

This fear of government intrusion may have been incorporated in the fourth amendment ban on unreasonable searches. The founding fathers considered the right to be left alone one of civilized society's most important rights.[21] Government cannot invade an individual's privacy without violating the individual's fourth amendment rights.[22] Thus, family privacy had been deeply ingrained in our legal consciousness, and when an issue was phrased in terms of privacy, courts were unlikely to intervene.

C. *Pronatalism*

The goal of family unity was more important than family privacy, however. At the very time courts were refusing to invade family privacy to protect wives and children, legislatures were passing statutes prohibiting contraception[23] and abortion.[24] These statutes proscribed the most private of acts behind closed doors, and intervened directly in personal family life.[25] Nevertheless, these provisions were consistent with the underlying goal of fostering family unity: "Our whole social system is founded on the theory of husband and wife living together as such, and the natural and reasonable expectancy is that children shall be born in that lawful wedlock."[26]

Emphasis on the family and pronatalism meant that women were needed at home. They were excluded from the political sphere by statutes that denied them the right to vote.[27] Their role in the economic world was circumscribed by protective legislation that limited their work hours,[28] and by cases that restricted the types of jobs they could

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21. Olmstead v. United States, 277 U.S. 438, 478 (1927) (Brandeis, J., dissenting) ("right to be let alone" is "right most valued by civilized men").

22. *Id.* ("[E]very unjustifiable intrusion by the Government upon the privacy of the individual . . . must be deemed a violation of the Fourth Amendment.").

23. *See supra* note 11.

24. *See supra* note 12.

25. In overturning these statutes, courts cited the constitutional right of privacy. Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

26. Cunningham v. Cunningham, 48 Pa. Super. 442, 447-48 (Super. Ct. 1912).

27. *E.g.*, ILL. REV. STAT. ch. 46, § 193, § 2 (1895) (current version at ILL. ANN. STAT. ch. 46, ¶ 6-26 (Smith-Hurd Supp. 1987)).

28. *See* Muller v. Oregon, 208 U.S. 412, 419 n.1 (1908). According to the Court, the following states limited women's working hours: Colorado, Connecticut, Louisiana, Maine, Maryland, Massachusetts, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Virginia, Washington, and Wisconsin. *Id.*

hold.[29] This protectionism was directly connected to the emphasis on family. For example, the court upholding Oregon's statutory limits on women's work hours stressed that: "[H]ealthy mothers are essential to vigorous offspring, [so] the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."[30] As late as 1968, courts were still protecting women from themselves in the work world. An appellate court in California indicated that allowing women to work as bartenders would negatively influence the women themselves, young people, and the general public.[31]

D. *Paternalism in Marriage Regulation*

Similarly, paternalistic courts also protected these fragile women from opportunistic men by granting damages for broken promises to marry. As the court in *Wightman v. Coates*[32] stressed, women needed more protection than men from broken promises to marry because a woman's life is materially affected by such "treachery."[33]

Various statutes also protected women from making unwise choices of husbands. These statutes set age limits,[34] health requirements,[35] and even racial requirements[36] for marriage. Legislatures and courts hoped that restricting access to marriage would create more permanent unions. Accordingly, in *In re McLaughlin's Estate*,[37] the court noted that marriage was closely related to the state, and suggested that improvident or improper marriages should be prevented.[38] The new

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29. *See, e.g.*, Hargens v. Alcoholic Beverages Control Appeals Bd., 263 Cal. App. 2d 601, 69 Cal. Rptr. 868 (Ct. App. 1968) (constitutional to prohibit females from dispensing alcoholic beverages behind any permanently affixed fixture used to serve such beverages, excepting licensees or licensee wives), *overruled*, Sail'er Inn, Inc. v. Kirby, 4 Cal. 3d 56, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (en banc).

30. Muller v. Oregon, 208 U.S. 412, 421 (1908).

31. *Hargens*, 263 Cal. App. 2d at 609-10, 69 Cal. Rptr. at 874.

32. 15 Mass. 1 (1 Pick.) (1818).

33. *Id.* at 3. The court stated:

> When the female is the injured party, there is generally more reason for a resort to the law than when the man is the sufferer . . . . A deserted female, whose prospects in life may be materially affected by the treachery of the man to whom she plighted her vows, will always receive from a jury the attention her situation requires . . . .

34. *E.g.*, N.Y. DOM. REL. LAW § 15(2) (McKinney 1983).

35. *E.g.*, ILL. ANN. STAT. ch. 40, ¶ 204 (Smith-Hurd 1983) (original version at ILL. REV. STAT. ch. 89, ¶¶ 6-6a (1937)).

36. *E.g.*, VA. CODE ANN. § 20-59 (1960) (repealed 1968).

37. 4 Wash. 570, 30 P. 651 (1892).

38. *Id.* at 591, 30 P. at 658.

statutes requiring marriage licenses ensured that only qualified people would marry. Thus, in *Agent v. Willis*,[39] the North Carolina Supreme Court emphasized the importance of marriage licenses when it criticized a county registrar who had issued a marriage license to an underage couple. The court stated that marriages should be protected by extensive laws that assure underage couples will not wrongfully obtain licenses.[40] By limiting access to marriage, the law protected the family unit.

When women did marry, the law protected the marriage from dissolution. Divorce was available only when one spouse was guilty of extreme misconduct.[41] Spousal rights after divorce were allocated according to prior behavior. Only pristine wives were entitled to alimony[42] or custody of their children.[43]

The preference for the family unit at the expense of individual family members pervaded the law. Neither a spouse nor an unemancipated child could sue an immediate family member for torts.[44] The state was even willing to support family unity at the expense of criminal convictions. Thus, spouses were not allowed to testify against each other in criminal cases.[45]

E. *"Good" Families and "Bad" Families*

The family that merited such broad protection was, however, very narrowly defined. The protected family consisted of a legally married couple and their offspring.[46] Thus, illegitimate children had no right to inheritance[47] or support from their natural fathers.[48] Similarly,

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39. 124 N.C. 21, 32 S.E. 322 (1899).

40. *Id.* at 23, 32 S.E. at 322.

41. *See* Friedman, *supra* note 10.

42. *See, e.g.*, Spitler v. Spitler, 108 Ill. 120, 122 (1883) ("[If she] has, by her misconduct, forfeited her claim upon appellant for support, she has no equitable ground upon which to claim alimony as a right.").

43. *See, e.g.*, Commonwealth v. Addicks, 2 Serg & Rawle 174 (Pa. 1815) (holding that an adulterous mother could not retain custody of her daughters).

44. *See, e.g.*, Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908).

45. Hawkins v. United States, 358 U.S. 74 (1958).

46. E. RUBIN, THE SUPREME COURT AND THE AMERICAN FAMILY 16 (1986).

47. Labine v. Vincent, 401 U.S. 532 (1971); Strahan v. Strahan, 304 F. Supp. 40 (W.D. La. 1969), *cert. denied*, 404 U.S. 949 (1971).

48. *See, e.g.*, Holy Infancy v. Kaska, 397 S.W.2d 208 (Tex. 1965); *see also* Baston v. Sears, 15 Ohio St. 2d 166, 239 N.E.2d 62 (1968) (Ohio statute making non-support for illegitimate child a crime did not create a civil cause of action for support), *overruled*, Franklin v. Julian, 30 Ohio St. 2d 228, 283 N.E.2d 813 (1972) (superseded by statute as stated in Manley v. Howard, 25 Ohio App. 3d 1, 495 N.E.2d 436 (Ct. App. 1985)).

courts refused to recognize the Mormon community's bigamous marriages or their offspring.[49] The courts distinguished between good families — those composed of lawfully wedded parents and their offspring, and bad families — those existing outside a legal marriage. Good families received nearly absolute protection, while bad families had virtually none.[50]

III. The Shift to Individual Protection

A. *The Constitutional Right to Privacy: A Transition to Individualism*

As noted above, society always strongly valued family privacy. But in 1965, the Supreme Court elevated privacy into a constitutional right when it legalized contraception in *Griswold v. Connecticut*.[51] Justice Douglas, speaking for a plurality of the Court, noted that although privacy was not specifically mentioned in the Constitution, it was protected under the penumbra of the Bill of Rights.[52] In so concluding, Douglas used the familiar language of family unity: "We deal with a right of privacy older than the Bill of Rights . . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[53] Justices Goldberg, Warren, and Brennan agreed that marital privacy was a constitutional right, but they relied on the ninth amendment, which preserved certain non-enumerated rights. Justice Goldberg referred to the right of privacy as being fundamental.[54]

In spite of the familiar language about the sanctity of marriage, the Court abandoned the pro-natal view typical of the pro-family era. Courts had long touted the importance of privacy, and had even suggested a constitutional basis for it.[55] But courts had never before defined privacy to include the right to distribute or use contraceptives. Although the decision emphasized pro-family values, the Court was paving the road to individual choice.

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49. *In re* State *ex. rel.* Black, 3 Utah 2d 315, 283 P.2d 887 (1955).

50. For a similar analysis made in the context of criminal constitutional rights, see T. O'Neill, *The Good, the Bad, and the Burger Court: Victims' Rights and a New Model of Criminal Review*, 75 J. Crim. L. & Criminology 363 (1984).

51. 381 U.S. 479 (1965).

52. *Id.* at 484.

53. *Id.* at 486.

54. *Id.* at 491.

55. *See supra* note 21 and accompanying text.

B. *The Shift to Individualism and Procreative Choice*

The new constitutional right of privacy quickly became not a family right, but an individual right. In *Eisenstadt v. Baird*,[56] the Supreme Court extended the fundamental right to use contraceptives to single individuals and suggested that a married couple is not a separate legal entity, but rather a coupling of two independent and unique individuals.[57]

Under the pro-family paradigm, courts had adopted a pro-natal view. The new emphasis on individual privacy supported individual procreative choice. The *Eisenstadt* Court explained that for the right of privacy to have real value, married or single individuals must be unaffected by government influences over procreative decisions.[58] Cases following *Eisenstadt* recognized individual constitutional rights for minors to use contraceptives,[59] women to have early abortions,[60] and minors to have abortions without parental consent.[61]

The new individualism reached its apex in *Planned Parenthood v. Danforth*,[62] which permitted women to have abortions without spousal consent. The Court ruled that because the state could not prohibit an abortion, it could not delegate such authority to a husband. Moreover, when a couple disagreed about the wisdom of the abortion, only one opinion could prevail. Because the wife had to carry the fetus and bear the child, she should ultimately have the power to decide. The Court quickly disposed of the argument that mandatory spousal consent would encourage family unity. The Court declared that marital trust would not be advanced by granting husbands veto power over their wives' abortion decisions.[63] The Court thus focused the issue on a conflict of individual rights, and cast doubt on the government's ability to foster family harmony.

C. *Individualism at the Expense of Privacy*

In spite of the new commitment to the constitutional right of privacy, individualism prevailed when individualism and privacy con-

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56. 405 U.S. 438 (1972).

57. *Id.* at 453: "[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up."

58. *Id.*

59. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

60. Roe v. Wade, 410 U.S. 113 (1973).

61. *See* Bellotti v. Baird, 443 U.S. 622 (1979).

62. 428 U.S. 52 (1976).

63. *Id.* at 71.

flicted. Courts were quite willing to intrude on marital privacy to further the goals of individual independence. In the pro-family era, family privacy had been protected by rules prohibiting spouses from testifying against each other in criminal trials.[64] In overturning that long-standing rule, the Court, in *Trammel v. United States*,[65] emphasized the new independence of spouses within marriage.[66] Now spouses were free[67] to testify against each other in criminal trials. Wife-beaters could no longer hide behind their castle doors.[68]

In the pro-family era, courts had used the privacy doctrine to support family unity, but disregarded privacy when it countered their pro-natal views. With the shift to individualism, courts again relied on privacy considerations that served the underlying goal of individual independence, but disregarded privacy considerations that might limit individuals.

D. *Individualism Beyond the Bounds of Privacy: The Emergence of Stronger Women*

The new emphasis on individuals reflected new societal views about the role of women. Society no longer viewed women as subservient homemakers who needed protection from the harsh realities of the workplace and the political sphere. Protective legislation that prevented women from working overtime was overturned.[69] Women were enfranchised,[70] and guaranteed equal pay for equal work.[71]

The new, stronger women needed less protection in marital affairs as well. Breach of promise actions fell into disfavor.[72] Divorce became

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64. Hawkins v. United States, 358 U.S. 74 (1958).

65. 445 U.S. 40 (1980).

66. *Id.* at 52. "Chip by chip, over the years those archaic notions have been cast aside so that '[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.'" *Id.* (quoting Stanton v. Stanton, 421 U.S. 7, 14-15 (1975)).

67. Given the state's power to indict spouses as co-conspirators, such decisions were rarely "freely" made. *See* Lempert, *A Right to Every Woman's Evidence*, 66 IOWA L. REV. 725 (1981).

68. *See, e.g.*, People v. Cameron, 53 Cal. App. 3d 786, 126 Cal. Rptr. 44 (Ct. App. 1975).

69. *E.g.*, Ritchie v. People, 155 Ill. 98, 40 N.E. 454 (1895).

70. U.S. CONST. amend. XIX.

71. Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1982).

72. *See, e.g.*, ILL. ANN. STAT. ch. 40, § 1801 (Smith-Hurd 1980) (originally enacted as ILL. REV. STAT. ch. 89, § 25 (1948)):

> It is hereby declared, as a matter of legislative determination, that the remedy heretofore provided by law for the enforcement of actions based upon breaches of promises or agreements to marry has been subject to grave abuses . . . . Accordingly, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by limiting the damages recoverable in such actions . . . .

more accessible with the advent of no-fault divorce.[73] Because society viewed women as capable of supporting themselves, alimony became more difficult for women to get.[74] Similarly, because women were no longer viewed as the sole keepers of the hearth, courts began to recognize more men's custody rights[75] and more frequently granted joint custody.[76]

E. *A New Definition of "Good" and "Bad" Families*

Because individual interests could no longer be sacrificed in the name of family unity, courts needed to redefine good and bad families. Families were no longer judged by the marital status of the parents. Accordingly, illegitimate children were allowed to recover support from their fathers,[77] unwed fathers were given custody rights,[78] and unwed mates were granted support payments.[79] All of these changes benefited the previously excluded individuals.

Nevertheless, courts still distinguished the good from the bad. Courts were willing to intervene in families that abused family members[80] or engaged in criminal conduct.[81] Courts were willing to repress individual sexual freedom in bad groups. Thus, courts upheld a ban on homosexual activity in the Navy,[82] and sustained sodomy laws that prohibited private homosexual relations.[83] In spite of the dramatic shift toward individual rights, courts still protected the good and ostracized the bad.

IV. THE PROBLEM WITH THE DICHOTOMY BETWEEN THE FAMILY AND THE INDIVIDUAL

A. *Intolerance of Heterogeneity*

Schneider has suggested that the rise of individualism has been associated with a decline in morality.[84] He notes that courts no longer

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73. *See* statutes cited *supra* note 1.

74. *See* UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 160 (1979) (spouse entitled to support only if unable to support self or if custodian for small children).

75. *See* Freed & Walker, *Family Law in the Fifty States: An Overview*, 19 FAM. L.Q. 331, 401 (1986).

76. *See generally* JOINT CUSTODY AND SHARED PARENTING (J. Folberg ed. 1984).

77. *See, e.g.*, Gomez v. Perez, 409 U.S. 535 (1973).

78. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972).

79. *See, e.g.*, Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

80. *See, e.g.*, People v. Cameron, 53 Cal. App. 3d 786, 126 Cal. Rptr. 44 (Ct. App. 1975).

81. *Trammel*, 445 U.S. at 40.

82. Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984).

83. Bowers v. Hardwick, 106 S. Ct. 2841 (1986).

84. Schneider, *supra* note 14.

asked "what is right?," but rather, "what works?" Thus, in *Danforth*,[85] the Court suggested that allowing a husband consent privileges concerning an abortion would not work to unify a marriage. Similarly, in *Trammel*,[86] the Court held that permitting a spouse to exercise a testimonial privilege would not work to save a marriage.

Although using the language of social utility, the courts were still making moral judgments. As previously noted, both the pro-family decisions and the individualistic decisions protected the good and ostracized the bad. All that changed were the definitions of good and bad.

Both paradigms set up a fairly rigid set of expectations about what was good. The pro-family paradigm rewarded a unified nuclear family with two legally married parents and their legitimate children.[87] The individualistic paradigm rewarded strong, economically independent, middle-class individuals.[88] Under both paradigms, those who did not conform to the norm were penalized. For example, in the pro-family era, Mormons[89] and illegitimates[90] suffered. In the individualistic era, the underclass[91] and homosexuals[92] suffered. This tendency to see families as good or bad meant that both paradigms were intolerant of non-conforming lifestyles. Thus, the tendency to dichotomize between the individual and the family exacerbated intolerance for natural heterogeneity.

B. *Fostering Divisiveness*

The tendency to focus on individuals instead of the family as a unit also fosters divisiveness. Consider, for example, testimonial privileges. Traditionally, spouses could not testify against each other in criminal trials,[93] a rule that helped preserve marriages. In *Trammel*,[94] the Supreme Court held that this testimonial privilege belonged only to the testifying spouse, and hence, one spouse could testify against the other.

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85. *Danforth*, 482 U.S. at 71.
86. *Trammel*, 445 U.S. at 52.
87. *See supra* § II.E.
88. *See infra* § V.F.
89. *See supra* note 49 and accompanying text.
90. *See supra* note 47 and accompanying text.
91. *See supra* text accompanying note 50; *see also infra* note 125 and accompanying text.
92. *See* Bowers v. Hardwick, 106 S. Ct. 2841 (1986).
93. *See* Hawkins v. United States, 358 U.S. 74 (1958).
94. *Trammel*, 445 U.S. at 40.

A major problem with *Trammel* is that it focused on individuals instead of on the family unit. Schneider argues that this tendency is inherent in the very notion of rights.

> [T]he rights schema is often inapposite in the family context, since there a right against the government is also a right against other family members . . . . To put the point somewhat differently, our tendency to constitutionalize family law and thus to think of it in terms of rights means that, when the law transfers moral decisions, it transfers them to individuals rather than to families, thus sustaining the image of the family as a collection of discrete individuals.[95]

But the problem in *Trammel* is not that the Court was discussing the nature of rights or privileges, but rather that in doing so, the Court concentrated on *individual* rights. Arguably, the family in *Trammel* needed a right, a *family* right, to assert against the government. Nothing inherent in the nature of rights limits them to individuals. Rights may belong to groups such as families as well as to individuals.

V. A Theory of Family Rights

A. *The Nature of Rights*

When individual independence replaced family unity as the pervasive goal in family law, the new rules were expressed as rights. For example, consider the right of illegitimates to support,[96] the right of unwed fathers to custody,[97] and the right of an unmarried lover to support payments.[98] In order to understand this new theory of family rights, one must first understand the nature of rights.

The word "right" can be used in both a moral and a legal sense. Morally, a person has acted "rightly" by doing what ought to be done. In this sense, right is the opposite of wrong. At least arguably, a legal right is simply a codification of what a legislature or a court believes is morally right. Dworkin suggests that a rule differs from an order because a rule is normative and sets standards for behavior that affect the subject of the rule beyond the mere threat of rule enforcement.[99] As Dworkin implies, however, a legal right is different

95. Schneider, *supra* note 14, at 1858.
96. Gomez v. Perez, 409 U.S. 535 (1973).
97. Stanley v. Illinois, 405 U.S. 645 (1972).
98. Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).
99. R. Dworkin, Taking Rights Seriously 19-20 (1977).

from a mere moral right because the government does have enforcement power. Thus, one must respect another's legal rights.

Some rights are more important than others. We call some rights, such as free speech, freedom of religion, and privacy, "fundamental" because we believe they are so basic that they must never be infringed. Some of these fundamental rights are constitutionally guaranteed in the Bill of Rights. Others are not. Dworkin argues that the only fundamental rights are those that affect dignity or equality. He states that a person enjoys fundamental rights against government if the rights are necessary to protect the person's dignity or standing.[100]

As Dworkin uses the term "dignity," he means more than a subjective notion of propriety. He uses the term to summarize Kant's categorical imperative to treat others as we would like to be treated.[101] When we treat others in ways we would not want to be treated, we have impinged on their dignity.

B. *Privacy as a Fundamental Right*

Using this analysis, we see that the Court was correct in viewing privacy as a fundamental constitutional right. Few of us would want others to inquire into the intimate details of our home lives. Because invading family privacy poses a direct threat to dignity in Dworkin's sense of the word, family privacy must be a fundamental right.

The strongest critics of individualistic liberalism might argue that privacy is merely a device to superimpose the will of the individual over the common welfare. These critics reject Kant's categorical imperative altogether.[102] Nevertheless, privacy is so deeply rooted in our history that privacy itself may constitute one of the community's notions of the common welfare. At least one author has noted that contrasting political viewpoints agree that government regulation or influence should not affect certain private activities.[103] As our analysis of the pro-family paradigm indicates, courts have recognized some sort of right of privacy for hundreds of years.

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100. *Id.* at 199.

101. *Id.* at 198.

102. *See* M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

103. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429, 1430 (1982).

1. The Definition Problem: The Consequentialist View and Homosexuality

The problem with a fundamental right of privacy is that although we may all agree that the right should exist, we do not all agree on what should be included within the right. As Mnookin points out, liberals consider sexuality a private sphere, but view economics as a public sphere. Conservatives, on the other hand, strongly endorse private economic enterprise, but favor regulation of sexual matters, such as abortion and homosexuality.[104] Because we have no definitive standards to determine what is private, courts have defined the private sphere to correspond with subjective notions of good and bad. As a result, one can argue that the dichotomy between public and private is meaningless, and that we should base decisions solely on desirable consequences.[105] Loosely translated, this seems to mean courts may appropriately make subjective evaluations of the community's view of the common welfare.

Two problems with the consequentialist view are apparent. First, it ignores that in some instances, privacy is the central issue in the case. Second, it condones intolerance. *Bowers v. Hardwick*[106] illustrates both problems. In *Bowers*, the ultimate issue should not have been whether homosexuality was good or bad, but rather whether the state had any right to intrude into the privacy of Hardwick's bedroom. In this context, to suggest that the dichotomy between public and private is meaningless is absurd. The distinction between homosexual behavior in a public restroom and that in a private bedroom is a crucial one, and cannot be dismissed. By refusing to apply privacy standards, the Court adopted the consequentialist view. Because the Georgia legislature and that of twenty-three other states had decided that homosexuality was immoral,[107] the Court would not tolerate homosexuality, even in the privacy of Hardwick's home. The result of the decision was intolerance for any deviation from the majority's idea of good.

2. The Balancing Problem: Wife Abuse

In spite of the definitional problems, we return to the notion that a fundamental right to privacy exists. Clearly, though, the right to

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104. *Id.*
105. *See id.* at 1435.
106. 106 S. Ct. 2841 (1986).
107. *See id.* at 2845 (citing *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 524 n.9 (1986)).

privacy is not necessarily paramount in all situations. We would be far more willing to apply the consequentialist standard in a wife-beating case like *State v. Rhodes*.[108] In such a situation, we might be willing to disregard the husband's right to privacy in order to physically protect the wife. Even Dworkin admits that fundamental rights may be limited to accommodate other rights. Dworkin finds it acceptable to balance rights when government faces a choice between equally valid but competing rights.[109] Courts must balance the right of privacy against the individual's right to be secure from physical violence.

C. *A New Theory of Family Rights*

The attempt to balance these rights illustrates the two basic principles of the new theory of family rights. First, fundamental family rights belong both to the family as a group, and to each individual family member.[110] Second, when competing rights need to be accommodated, the objectively weaker party should take priority.

Consider the facts in *Rhodes*.[111] The state prosecuted a husband for beating his wife, and the husband asserted his right of family privacy as a bar.[112] Applying the first principle, we find that both the husband and the wife had an equal interest in asserting the family right of privacy, but by pressing charges against her husband, the wife waived her right. Once the state filed suit, the facts were publicly disclosed, thus destroying any actual confidentiality. Arguably, however, the wife had no authority to waive the husband's right of privacy. Therefore, we must apply the second principle when balancing the husband's right of privacy against the wife's right not to be beaten. Because we presume the aggressor is the stronger party, we protect the rights of the weaker victim and decide that the wife's right not to be beaten outweighs the husband's right to privacy.

D. *The Context of Rights: Vertical and Horizontal*

Notice that rights only arise in an adversary context. One only has rights against other people or the government. Thus, rights arise

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108. 62 N.C. (Phil. Law) 453 (1868).

109. R. DWORKIN, *supra* note 99, at 199.

110. The theory need not be limited to fundamental rights. It can be applied to lesser interests that inhere in the family as a whole. For example, in the context of a wrongful life action, a court held that the duty to correctly diagnose hereditary deafness extended beyond the child examined to embrace the entire family, including a sibling not yet conceived. Turpin v. Sortini, 31 Cal. 3d 220, 230, 643 P.2d 954, 960, 182 Cal. Rptr. 337, 343 (1982).

111. *Rhodes*, 62 N.C. at 453.

112. *Id.* at 459.

within two contexts: the vertical context, in which rights protect families or individuals from the government or other outside agencies; and the horizontal context, in which rights protect individuals from other individuals. The new focus on individualism has obscured the potential need to protect the family unit as a whole from government intrusion.[113] Communitarians criticize the entire concept of individual rights as artificially isolating individuals from the communities to which they belong.[114] The family is one such community. Because the government is much more powerful than any family, we must be especially vigilant in protecting family rights from government intrusion.

E. *The Vertical Context: Protecting Families Against the Government*

1. Spousal Testimonial Privileges

The need for vigilance is best illustrated by the Supreme Court's decision in *Trammel*.[115] There, a husband and wife, as well as other co-conspirators, were arrested on drug charges. The government agreed not to prosecute the wife if she would testify against her husband. The husband asserted his spousal testimonial privilege to prevent his wife from testifying.[116] Such a spousal privilege had been recognized at common law since the Middle Ages.[117] Although the privilege had never been characterized as a constitutional right, it is fundamental in Dworkin's sense of the word.

The Court in *Trammel* recognized that the spousal privilege was an ancient one designed to protect marriages.[118] However, the Court suggested that if a wife were willing to testify, there could not be much of a marriage left to save.[119] Accordingly, the Court held that the privilege belonged only to the testifying spouse. The Court found

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113. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 988 (1978): "Once the State, whether acting through its courts or otherwise, has 'liberated' the child — and the adult — from the shackles of such intermediate groups as family, what is to defend the individual against the combined tyranny of the State and her own alienation?"

114. *See* M. SANDEL, *supra* note 102; *supra* note 95 and accompanying text.

115. *Trammel*, 445 U.S. at 40.

116. *Id.* at 42-43.

117. *See* E. COKE, *supra* note 18.

118. *Trammel*, 445 U.S. at 44.

119. *Id.* Note the similarity to the Court's view in *Danforth*, 428 U.S. at 75, that it may be futile for the government to try to preserve family harmony. This idea has been more fully explored by Schneider, *supra* note 14.

that the societal interest in criminal convictions outweighed the Trammels' interest in preserving a damaged relationship.[120]

At first glance, *Trammel* might seem similar to *Rhodes*, in which the wife arguably waived the family right. But a distinction is immediately obvious. In *Rhodes*, the wife came to the government seeking protection from her husband. Her actions were certainly voluntary. In *Trammel*, the wife acted under government compulsion. Her choice was either to testify or to be prosecuted herself. Thus, her waiver was not truly free and voluntary.

But, even if Elizabeth Trammel had been acting voluntarily, she had no right to waive a family right for her husband. The first principle of the new rights theory is that fundamental rights belong both to the family as a group, and to each individual family member. The testimonial privilege therefore belongs to both the defendant and the testifying spouse, and either one should be able to assert that privilege.

Since the testimonial privilege is fundamental, the government cannot override it merely to obtain criminal convictions. As Dworkin explains:

> There would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient. So the general benefit cannot be a good ground for abridging rights . . . .[121]

Applying this article's second premise gives a similar result. When competing interests are involved, the objectively weaker party should take priority. Faced with the choice of testimony or jail, Elizabeth Trammel was powerless. Obviously, the Trammel family was decidedly less powerful than the federal government. Hence, the family right to a spousal testimonial privilege should have prevailed.[122]

2. Parent/Child Testimonial Privileges

Applying the principles suggested in this article shows that testimonial privileges should be expanded, not contracted. *United States v. Penn*[123] illustrates why. In *Penn*, the police had a warrant to search

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120. *Trammel*, 445 U.S. at 52.

121. R. DWORKIN, *supra* note 99, at 193.

122. The government solicited family disloyalty when it offered Elizabeth Trammel the opportunity to testify in return for leniency. *See Trammel*, 445 U.S. at 42.

123. 647 F.2d 876 (9th Cir.), *cert. denied*, 449 U.S. 903 (1980).

Clara Penn's home for drugs. Once on the premises, the police isolated Penn's five year old son and bribed him into showing them where some heroin was hidden. The trial court found it shocking that the policeman had bribed the child to obtain evidence to implicate the child's mother.[124] The Ninth Circuit reversed, indicating that although the policeman had acted reprehensibly, such conduct was acceptable because the court found the Penns' family relationship undesirable.[125]

Although the *Trammel* Court had only hinted that bad families had no rights, the *Penn* court virtually admitted as much. Such a concept undermines the idea of justice. Rawls has described as fundamental the notion that persons are entitled to equality regardless of their social station in life.[126] We should be just as willing to protect the privacy of the Penn home as the privacy of the Griswold home.

If the *Penn* court had applied the two principles advanced in this article, it would have reached a far more just result. First, because family rights belong to the entire family, either the child or his mother would have been able to assert either a testimonial privilege or a family right of privacy. Second, because the court was balancing the right of a child, a mother, and a family against the government, the family members should have prevailed because they were less powerful.

Note that this theory works well in the vertical context, where we need to protect the family unit or its individuals from the government.[127] Theoretically, the sole function of rights is to protect individuals or families. A purist might argue that rights should be used only to protect individuals, not to allocate privileges among them. To stop there, however, would ignore the more complex problems that arise in the horizontal context, where individuals compete against each other.

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124. *Id.* at 879.

125. *See Penn*, 647 F.2d at 881: "[W]e would not fulfill our duty . . . unless we took into account what manner of family unit it was. It was a family unit in which the mother involved her children deeply in the actual operation of her heroin-dealing business."

126. J. RAWLS, A THEORY OF JUSTICE 511 (1971).

127. At least one court already has recognized this distinction between the vertical context and the horizontal context. Romeo v. Romeo, 84 N.J. 289, 418 A.2d 258 (1980). There, although New Jersey law refused to recognize spousal contracts because they created family disharmony, the court recognized an employment contract between a husband and wife in order to allow the wife to recover a workmen's compensation award for her husband's death. The court noted that the rule against interspousal contracts, which was meant to protect spouses in the horizontal context within the family, need not be followed in the family's vertical relationship to the insurer. *See id.* at 297-303, 418 A.2d at 263-66.

F. *The Horizontal Context: Allocating Rights Between Family Members*

1. Child Custody

We proceed beyond the vertical context for two reasons. First, the distinction between protection and allocation is a fuzzy one, especially in family law. For example, in order to protect a child's financial security, one may need to reallocate resources between the child's divorced parents. Second, a theory of family rights that failed to address the sticky questions that arise in the horizontal context would not be a useful theory. Most questions in family law address competing interests of different family members. Thus, the next step is to apply the theory in the horizontal context to allocate the rights of competing individuals, for example, in child custody disputes.

Balancing competing interests within the family calls for the second proposition of the theory: the weakest individuals should get the greatest protection. First, we must identify the weakest. The children have the least economic power, and the least control over their destiny. Protecting children must be one of the primary goals of any child custody scheme. Thus, where evidence of unfitness appears, especially if a propensity for any form of violence emerges, the court must protect the children by awarding sole custody to the other parent.

The real problem, however, arises when both parents are fit and have no history of violence. It may seem paradoxical to suggest custody should be awarded to the weaker party, even if we only mean the financially weaker party. To fully understand the application of the theory, then, we need to examine the actual practice in child custody disputes.

Increasingly, child custody has become yet another bargaining chip in the financial arrangements of a divorce. Although most states make no legal connection between custody and child support payments, in the typical negotiated settlement, a parent who wishes to gain sole custody must make some financial concessions. Given the context of a negotiated settlement, it is virtually impossible to separate custody from financial considerations.[128] Now that alimony is relatively rare,[129]

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128. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 959-60 (1979) ("[M]arital property, alimony, and child-support issues are all basically problems of money, and the distinctions among them become very blurred . . . . [T]he money and custody issues are inextricably linked.").

129. *See supra* note 74. Glendon suggests that alimony is relevant only in a small portion of cases because most families simply do not have the resources to support two households. M. GLENDON, *supra* note 14, at 82.

concessions must come from property settlements and child support payments. That scenario creates two problems. First, the worse a parent is, the more financial concessions the other parent will make to prevent the bad parent from getting custody. Thus, a parent who is truly concerned about the welfare of the child may be willing to bargain away the child's financial security to guarantee the child's emotional security. Second, parents who choose to stay home with their children are at a tremendous disadvantage. Much of their identity may be tied to their custodial role, yet they have relatively little financial bargaining power. These parents, too, may be tempted to bargain away their means of support to retain custody.[130]

The theory's preference for the weaker party helps to balance the scales in the negotiation process. The theory would create a presumption in favor of the weaker parent. The presumption would give additional bargaining power to a concerned or financially insecure parent. Thus, the parent would not have to forfeit a child's financial security to retain custody. As a result, negotiated support payments should increase, and the children of divorced parents should be more financially secure. The mechanism for this presumption already exists in several states that have adopted some form of a presumption in favor of the primary caretaker in custody disputes.[131]

Of course, when both parents have comparable financial resources, and hence equal bargaining power, neither one is weaker. In that instance, no presumption is necessary to balance the scales, and the parties may negotiate appropriate custody arrangements without jeopardizing the financial security of the children.

2. Alimony[132]

The theory can also be applied horizontally to help a court decide alimony issues. In the pro-family era, alimony was linked to good

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130. *See* Mnookin & Kornhauser, *supra* note 128.

131. *See, e.g.*, Berndt v. Berndt, 292 N.W.2d 1 (Minn. 1980); *In re Maxwell*, 8 Ohio App. 2d 302, 456 N.E.2d 1218 (1982); Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981). This preference for the primary care-taker is sex-neutral. *See, e.g.*, J.E.I. v. L.M.I., 314 S.E.2d 67 (W. Va. 1984) (holding that the father was the primary caretaker).

132. Many regard alimony (or more recently "spousal support") as an outdated concept, for pragmatic as well as philosophical reasons. Admittedly, few families can afford to support two households, so the concept is often irrelevant. *See M. GLENDON, supra* note 14, at 82. If, however, the concept helps to protect even a miniscule portion of the population, it serves a useful purpose.

conduct.[133] Courts punished straying husbands with the obligation to support well-behaved ex-wives.[134]

The shift to individualism reflected the fact that more women were working outside the home. These strong, economically independent women had a less valid claim to support. Legislatures and courts began to look at alimony as rehabilitative.[135] Short-term alimony would enable women to become economically independent, but long-term support was disfavored.[136]

But problems with the new approach are evident. First, not all women are economically independent. Many women still have roles only as wives and mothers. Fifty-two percent of mothers of infants and thirty-three percent of mothers of pre-school children do not work outside the home.[137] These women are necessarily economically dependent:

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133. *See supra* note 42.

134. *E.g.*, Poppe v. Poppe, 114 Ind. App. 348, 52 N.E.2d 506 (1944) (holding that an adulterous husband had to give his wife more than 90% of the value of his assets).

135. There is a definite trend to adopt rehabilitative alimony. For example, in California, in 1968, only 1/3 of the spousal support awards had a specific date for termination. By 1977, 2/3 of the awards were for a limited time period, with a median duration of 25 months. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1226 (1981). By 1983, 22 other states had made rehabilitative awards: Arizona, ARIZ. REV. STAT. ANN. § 25-319(B)(2) (1976); Colorado, COLO. REV. STAT. § 14-10-114(2)(b) (1974 & Supp. 1986); Delaware, DEL. CODE ANN. tit. 13, § 1502(6) (1981); Florida, Mertz v. Mertz, 287 So. 2d 691 (Fla. 2d. D.C.A. 1973); FLA. STAT. § 61.08(1) (1985); Hawaii, HAW. REV. STAT. § 580-47(a)(13) (1985); Idaho, IDAHO CODE § 32-705(2)(b) (1983); Illinois, ILL. ANN. STAT. ch. 40, ¶ 504(b)(2) (Smith-Hurd Supp. 1987); Indiana, IND. CODE ANN. § 31-1-11.5-11 (Burns 1980); Kansas, KAN. STAT. ANN. § 60-1610(b)(2) (1983); Kentucky, KY. REV. STAT. ANN. § 403.200(2)(b) (Michie/Bobbs-Merrill 1984); Maryland, MD. FAM. LAW CODE ANN. § 11-106(b)(2) (1984); Minnesota, MINN. STAT. ANN. § 518.552 (West Supp. 1986-1987); Missouri, MO. ANN. STAT. § 452.335.2(2) (Vernon 1986); Montana, MONT. CODE ANN. § 40-4-203(2)(b) (1985); New Hampshire, Comer v. Comer, 110 N.H. 505, 272 A.2d 586 (1970); New York, N.Y. DOM. REL. LAW § 236(B)(6)(a)(4) (McKinney 1986); Oregon, *In re* Marriage of Stewart, 59 Or. App. 713, 651 P.2d 1379 (Ct. App. 1982); Pennsylvania, 23 PA. CONS. STAT. ANN. § 501(b) (Purdon Supp. 1987); Tennessee, Stone v. Stone, 56 Tenn. App., 409 S.W.2d 388 (1966); Vermont, VT. STAT. ANN. tit. 15, § 751(b)(4) (Supp. 1986); Washington, Dakin v. Dakin, 62 Wash. 2d 687, 384 P.2d 639 (1963) (en banc); Wisconsin, Carty v. Carty, 87 Wis. 2d 759, 275 N.W.2d 888 (1979).

136. At least four states have no provisions for long-term alimony: Delaware, DEL. CODE ANN. tit. 13, § 1512(a)(3) (1981) (no long-term alimony unless married more than 20 years); New Hampshire, N.H. REV. STAT. ANN. § 458.19 (1983); Pennsylvania, 23 PA. CONS. STAT. ANN. § 501(c) (Purdon 1980); Texas, *In re* Long, 542 S.W.2d 712 (Tex. 1976); Francis v. Francis, 412 S.W.2d 29 (Tex. 1967).

137. *See A New Family Issue*, NEWSWEEK, Jan. 26, 1987, at 22.

> Under modern conditions, where the work place is usually distant from the family dwelling, the devotion of the mother entirely to child-raising and care of the household meant that she ordinarily had to forego outside work. At first this was seen as a luxury. It is only recently, when divorce has become common, that it has become clear what a price women who are not independently wealthy may have to pay for having left the primitive production community and the market-place for the home. It was one thing to be economically dependent in a world where divorce in both the *de facto* and legal sense was exceptional, where the norms of convention, custom, ethics and religion supported the ideal of indissolubility of marriage. It was quite another to be economically dependent in a world where divorce came more and more to be considered a right, necessary for each individual's pursuit of happiness or self-fulfillment.[138]

If these women stay out of the workplace for many years, they often find themselves in middle age with few job opportunities.[139] The new alimony rules allow ex-husbands to enjoy a middle age of prosperity,[140] while ex-wives are relegated to relative poverty.

Second, many working women have difficulty supporting themselves and their children. Although most women work, their earnings are only approximately sixty-five percent of men's.[141] The salary differential in the job market leaves women at a decided disadvantage.

Third, even well-educated women may find their earning power diminished if they take time off for child bearing. Many of these women hold only part-time jobs at lower pay than full-time jobs.[142] Frequently, re-entry into the job market after a few years off is difficult, and women must accept jobs at only a fraction of their prior salaries.[143]

Nevertheless, simply returning to the old alimony rules would be unfair to men whose wives earn as much as or more than they do.

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138. M. GLENDON, STATE LAW AND FAMILY 136-37 (1977).

139. Note, *Rehabilitative Alimony: An Old Wolf in New Clothes*, 13 N.Y.U. REV. L. & SOC. CHANGE 667, 669 (1984-1985).

140. *See* D. CHAMBERS, MAKING FATHERS PAY 48 (1979); Weitzman, *supra* note 135, at 1241.

141. U.S. DEP'T OF COMMERCE BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (107th ed. 1987).

142. Weitzman, *supra* note 135, at 1230 (citing Barrett, *Women in the Job Market: Unemployment and Work Schedules*, in THE SUBTLE REVOLUTION 81 (R. Smith ed. 1979)).

143. *Id.*

Applying the second principle solves these problems. Courts should determine who is the objectively weaker party and adjust alimony accordingly. Thus, a spouse of twenty-two years who had never worked would be entitled to full support. If both spouses work but one earned substantially less than the other, the lower paid spouse would be entitled to partial support to equalize the earnings. A well-educated spouse who had taken time off for children would be given temporary support until able to recapture former earnings potential.

VI. LIMITS OF THE THEORY

Naturally, this theory is not perfect. One of the problems with the idea that conflicts should be resolved in favor of the objectively weaker party is that power and justice are not the same. An individual's economic or political weakness does not mean that such an individual should prevail over a stronger one. One reason for the shift to individualism was a societal view that individuals should have to be self-sufficient.[144] Thus, to the extent that priority for the weaker individual rewards dependency, such priority may not be a wise idea.

Nevertheless, dependency is not inherently evil. Instead, it may be the unfortunate side effect of the decision to stay home to raise young children.[145] That decision is necessarily a personal one, and depends on a wide range of factors such as earning power, cost of child care, the age of the children, and the personal preferences of the couple. Society as a whole has no vested interest in that parental decision.

The problem, then, is to draft a neutral rule that will permit the parties to choose dependency or self-sufficiency without rewards or penalties. Freedom of contract would seem to perform that role. But in actuality, most family decisions are seldom reduced even to oral contracts. Even when they are, they are subject to change to reflect changing circumstances, such as the birth of a child. This article argues that the self-sufficient are so well-rewarded with status and money, and hence, so powerful, that we need to protect the dependents more.

Even when the preference does not specifically reward dependency, there may be some problems with a preference that may be reduced in practice to a simple preference for women and children. Recently, one state has allowed children to disassociate themselves from their admittedly fit parents.[146] Because children are arguably weaker than

144. *See* Molnar v. Molnar, 314 S.E.2d 73, 76 (W. Va. 1984) (holding that the purpose of rehabilitative alimony is to encourage spouses to be self-supporting).

145. *See supra* note 138 and accompanying text.

146. *In re* Synder, 85 Wash. 2d 182, 532 P.2d 278 (1975).

their parents, strictly applying our principles could mean that any teenager unhappy with parents' rules could successfully petition to be removed from the family. In this circumstance, however, the teenager may not always be objectively weaker. In the emotional battleground for control, parents, especially single ones, may have less actual power.

That argument illustrates another problem with the theory. Deciding which party is objectively weaker is not always easy. We need to establish some standard for defining "weaker." At the least, that standard should include some measure of economic power, but other standards may need to be developed as the rule is applied.

Finally, some critics may argue that the theory is simply a return to protectionism. Women, the critics may argue, will be characterized as less powerful, and demeaned in the process.[147] There are two responses to these criticisms. First, the theory calls for an objective determination of the weaker party. Frequently children have the least power. Occasionally men may be the weaker parties.[148] Each situation must be evaluated separately. To presume that women will always be the least powerful is a sexist attitude. Second, we must recognize that many women are economically disadvantaged. Women generally earn less than men,[149] and women who stay home to raise their children are economically dependent.[150] To structure a system as if all people had equal economic power is to ignore reality and deny protection to those who need it most.

VII. CONCLUSION

The pendulum of family rights has swung from absolute preference for the family unit to absolute preference for individuals. The process has manipulated our privacy rights to reflect the pendulum's position, resulting in an artificial dichotomy between the individual and the family. We can avoid this unnecessary conflict if we adopt a theory of family rights that holds that fundamental family rights belong both to the family as a whole, and to each of its individuals; and that when competing rights must be accommodated, the objectively weaker party should have priority. This new theory works in both the vertical context, to protect the family and its members from the government, and in the horizontal context, to weigh the rights of individuals. The result is a balance between unbridled individualism and familialism.

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147. *See* M. GLENDON, *supra* note 14, at 83.

148. Thus, in J.E.I. v. L.M.I., 314 S.E.2d 67 (W. Va. 1984), the court found that the father was the primary caretaker, and in the terminology of this article, the objectively weaker party.

149. *See supra* note 141.

150. *See* M. GLENDON, *supra* note 138 and accompanying text.